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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 147.

ALBERT KLEINSCHMIDT, REINHOLD KLEINSCHMIDT, CORNELIUS VAWTER, ISAAC GREENHOOD, FERDINAND BOHM, LOUIS M. COHN, RICHARD O. HICKMAN, ET AL., PLAINTIFFS IN ERROR,

vs.

JAMES S. McANDREWS AND JOHN S. BRISTOL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 27, 1882

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Bill of Exceptions.*

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

ALBERT KLEINSCHMIDT *et al.*

vs.

JAMES S. MCANDREWS and JOHN S. BRISTOL.

Be it remembered that among the records and proceedings in this case are the following, to wit:

On the 5th day of April, A. D. 1879, the plaintiffs filed their complaint herein, which is as follows, viz:

Complaint.

In 3rd Judicial District Court in and for Lewis and Clarke County, Montana Territory.

ALBERT KLEINSCHMIDT, REINHARD KLEINSCHMIDT, CORNELIUS L. Vawter, Moses Morris, David Morris, Henry M. Parchen, Harry D'Acheul, Charles Lehman, John Kinna, William Jack, Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, N. H. Webster

2 *vs.*

JAMES S. MCANDREWS and JOHN S. BRISTOL.

The plaintiffs complain and allege:

1. That on the 29th day of March, 1879, at Helena, Lewis and Clarke county aforesaid, the plaintiffs, Albert Kleinschmidt and Reinhard Kleinschmidt, were partners in business under the firm name of Kleinschmidt & Brother; that the plaintiffs, Isaac Greenhood, Ferdinand Bohm, & Richard O. Hickman, were partners doing business in said Helena under the firm name of Greenhood, Bohm & Co.; that Henry M. Parchen and Harry D'Acheul, two of said plaintiffs, were partners doing business in said Helena under the name and firm of Parchen & —, and that the plaintiffs, John Kinna & William Jack, were partners in business in said Helena under the firm name of Kiana & Jack; that the plaintiffs, Moses Morris and David Morris, were partners in business in said Helena under the firm name of Morris & Brother.

2. That on the thirtieth day of March, A. D. 1879, at Ves-
3 tel, in Deer Lodge county, Montana Territory, the plaintiffs were the owners of the following-described goods and chattels, of the value of three thousand four hundred dollars, to wit:

List of Goods of A. E. Ingersoll.

$2\frac{1}{2}$ doz. prs. gent's pants, $\frac{5}{12}$ gent's vests, $\frac{9}{12}$ doz. gent's coats, $\frac{4}{12}$ doz. canvas coats, $\frac{1}{6}$ doz. canvas vests, $\frac{7}{12}$ doz. pants, lined, $1\frac{11}{12}$ doz. jumpers, $\frac{2}{3}$ doz. overalls, $\frac{2}{3}$ doz. blue drawers, $1\frac{5}{6}$ doz. cas-imere overshirts, 1 doz. dark blue flannel overshirts, $1\frac{1}{6}$ doz. blue mission overshirts, $\frac{1}{3}$ doz. blue mission drawers, $2\frac{2}{3}$ doz. cotton overshirts, $1\frac{5}{8}$ doz

cotton flannel undershirts, $\frac{1}{6}$ doz. cotton flannel drawers, $2\frac{7}{12}$ doz. merino undershirts, $1\frac{7}{12}$ doz. merino drawers, $\frac{1}{3}$ doz. fl. undershirts, $\frac{1}{6}$ doz. flannel under-drawers, $\frac{1}{6}$ doz. white rubber coats, $\frac{1}{2}$ dz. cordigan jackets, $1\frac{1}{2}$ doz. col'd cotton shirts, $2\frac{1}{2}$ dz. white dress shirts, $\frac{1}{6}$ dz. blanket overcoats, $\frac{1}{12}$ dz. green blankets, $\frac{1}{3}$ dz. cotton counterpanes, $\frac{1}{2}$ doz. official hats, $\frac{5}{12}$ doz. official hats, $\frac{1}{3}$ doz. drab Nute hats, $1\frac{1}{12}$ dz. brown hats, $\frac{1}{3}$ dz. black fur hats, $\frac{1}{4}$ dz. black fur hats, $\frac{1}{3}$ dz. drab Nut hats, $\frac{1}{4}$ dz. drab Nut hats, high crown, $\frac{1}{12}$ dz. blk. official do., $\frac{5}{12}$ dz. worsted scarf-, $\frac{1}{3}$ dz. cloth caps, $1\frac{7}{12}$ dz. prs. buck gloves, $\frac{5}{12}$ doz. gauntlets, $\frac{1}{6}$ dz. fur Lawle, $\frac{5}{12}$ doz. dog skin, $\frac{1}{6}$ dz. wool, $1\frac{1}{12}$ dz. mittens, $\frac{7}{12}$ doz. buck mittens, $\frac{1}{12}$ dz. calf mittens, $3\frac{10}{12}$ [doz.] col'd wool socks, 1 dz. white wool socks, $\frac{1}{4}$ dz. merino socks (white), $\frac{1}{3}$ dz. merino wool socks (col'd), $\frac{10}{12}$ dz. cotton socks (col'd), $\frac{1}{12}$ dz. cotton socks (white), 1 dz. British socks, 1 dz. bandana h'dk'fs, $1\frac{5}{6}$ dz. boxes paper collars, $1\frac{7}{12}$ dz. linen collars, $\frac{1}{4}$ M 5-in. envelopes, 450 legal envelopes, $\frac{1}{4}$ ream note paper, $\frac{1}{2}$ ream letter paper, $2\frac{1}{12}$ dz. linen handkerchiefs, $\frac{2}{3}$ dz. prs. suspenders, 1 dz. bow neckties, $\frac{1}{6}$ dz. long neckties, $\frac{1}{2}$ dz. balbrigon hose, 1 dz. wool yarn, 9 dz. bath towels, 40 yds. crash, 40 yds. ticking, $10\frac{1}{2}$ yds. unbleached muslin, 119 yds. prints, 19 yds. bleached sheeting, 2 razor straps, 25 cakes toilet soap, 14 hair brushes, 2 dz. playing cards, $12\frac{1}{3}$ dz. Coats' white thread, $7\frac{1}{4}$ dz. Coats' blk thread, 1 doz. dressing combs, 2 doz. papers pins, $1\frac{1}{12}$ doz. memorandum books, $\frac{1}{2}$ doz. portmonies, 10 prs. Arctic overshoes, 4 prs. gent's gaiters, 2 prs. leather slip's, 2 prs. carpet slip's, 3 prs. lamb-lined overshoes, 45 prs. gent's leather boots, 6 prs. gent's brogan shoes, 1 pr. long rubber boots, 6 prs. short rubber boots, 4 boot tacks, 7 brooms, 2 grindstones, 5 saddle scinches, 7 leather bridles, 2 prs. spurs, 5 web halters, 1 blacksnake whip, 10 bridle bits, 1 showcase glass, 8 shaving boxes, 2 silk h'dk'fs, 1 David syringe, 3 cases surgical instruments, 3 hand mirrors, 24 portmonies, 2 hair brushes, 11 dressing combs, 6 pocket combs, 1 tape line, 8 penholders, 25 pocket knives, 40 pa. needles, 5 shaving brushes, $\frac{3}{4}$ gro. steel pens, 2 prs. shears, 12 cakes silver soap, 9 collar buttons, 8 leather match boxes, 3 bot's perfume, 10 bot's hair oil, 8 razors, 1 clock, 1 writing desk, 75 lbs. pitted cherries (more or less), 75 lbs. salt, 12,500 lbs. flour, $1\frac{1}{2}$ bag- oat meal, 1 sack beans, 75 lbs. bro. sugar, 27 seamless sacks, 2 trunks & contents, 2 valise- & contents, 1 bed & bedding, 4 chairs, washstand & contents, $\frac{2}{3}$ case lamp chimneys, 3 3-gal. keg pickles, 250 lbs. coarse salt, 6 sacks brown sugar, 13 sacks white sugar, 60 lbs. codfish, 3 sets grindstone fixtures, 2 sacks bacon (200 lbs., more or less), 7 cans coal oil, 3 buck saws, 1 stove & drum, 2 3-lb. boxes pears; 3 cans pears, 3 lbs.; 2 doz. cans goorts, 2 lbs.; $1\frac{2}{3}$ doz. cans jelly, ass't.; $1\frac{7}{12}$ dz. cans apples, 3 lbs.; 2 cans strawberries, 2 lbs.; $\frac{1}{6}$ dz. cans peaches, 3 lbs.; $1\frac{1}{3}$ dz. cans tomatoes, 2 lbs.; $\frac{1}{6}$ dz. corn, 2 lbs.; $\frac{2}{3}$ dz. Saddle Rock oysters, $2\frac{1}{4}$ Excelsior oysters; $\frac{1}{12}$ dz. Crown peaches, 3 lbs.; $\frac{1}{4}$ dz. lobsters, 2 lbs.; $\frac{1}{4}$ dz. salmon, 1 lb.; $2\frac{2}{3}$ condensed milk; $4\frac{1}{12}$ sardines, $\frac{1}{2}$ lb.; $\frac{1}{3}$ sardines, 1 lb.; 1 can lye, 5 boxes table cutlery, 20 lamp burners; 5 dz. lamp wicks, ass. sizes; 3 butcher knives, 7 pack's pat. medicine, 4 bot's harness oil, 7 cans maple syrup ($\frac{1}{2}$ gal.), 2 whisp brooms, 2 lbs. fine-cut to-

bacco (more or less), 9 lbs. star candles, 27 lbs. white R. soap, 2 pts. glycerine, 1 qt. glycerine, 1¼ V. T. tobacco, 65 lbs. plug tobacco, 30 lbs. crushed sugar (more or less), 8 lbs. Java coffee (more or less), 40 bar. sugar (more or less), 30 lbs. Rio coffee (more or less), 15 lbs. d. blackberries (more or less), 78 lbs. rice (more or less), 50 lbs. white beans (more or less), 4 cans lard (5 lbs. each), 13
7 sacks salt (5 lbs. each), 15 lbs. pealed peaches, ⅓ doz. frying pans; 33 lbs. soda; 17½ lbs. M. M. Jap. tea, ½ lb.; 27 lbs. fan tea; 1¼ dz. boxes confectionary, 1 lb.; 1⅙ dz. boxes confectionary, 2 lbs.; 1½ lbs. cloves (more or less), 10 plain confectionary jars, 1 lb. allspice (more or less), 2 lbs. nutmegs (more or less), 1 lb. sulphur (more or less), 2 lbs. alum (more or less), 2 lbs. mixed candy (more or less), 4 lbs. borax (more or less), ¾ dz. bots. vanilla, 5 bots. old Tom gin, superior; 11 bots. old Tom gin (London), 10 bots. Host. bitters, 4 qts. whiskey, 1 pt. whiskey, 5 pts. blackb. brandy, 3 pts. ginger brandy, ½ bbl. Michigan apples, ½ c. matches, ½ tin California matches, 1 box lemon extract, 1 box drugs, ½ pail Olymp. fine cut, not No. 1; 3 opened boxes glass, 1 box twine; ½ dz. axes, 1 s'k currants, 2 s'ks coffee, 1 bbl. blackberries, 1 bbl. Mich. apples, 1 bbl. pealed peaches, 1 bx. pt. flasks, 3 cases oysters, 3 cases corn; 1 case tomatoes, 3 lbs.; 1 case peaches (2 lbs.); 1 case gooseberries, 2 lbs.; 1 case strawberries, 2 lbs.; 325 lbs. nails, asst. sizes; 32 boxes spices, asst., 2 oz.; 2 boxes seedless raisins; 6 cases b. pears, 3 lbs.; 4 lbs. bar W. R. soap, 2 C. pepper sauce, 1 coil ½-in. rope, 1
8 box crackers, 2 boxes C. star candles; 2 lbs. apples, 3 cans; 1 box corn starch, 20 lbs. ⅝-in. rope, 10 straw hats, 15 lbs. butter (more or less), 1½ dz. beer, 1 caddie tobacco, 2 boxes nuts, 1 can golden syrup, 1 chest black tea, 10 lbs. sal soda, 1 chest imp. tea, ½ dz. porus plasters, 5 coffee pots, ½ dz. milk pans, ½ dz. pails, 5 coal oil cans, 4 pcks. Alden apples, 27 lamp chimneys, ½ dz. hand lamps, 15 pt. cups, 1 camp kettle, 10 tin plates, 1 tin pail, 1 wash basin, 1 coffee mill, 1 set strap hinges, 6 auger bits; 1 keg syrup, 5 gal.; 1 can lard, 10 pts. cherries, 5 pails, 3 hoops, 1 dz. shovels, 11 axe handles; 1 sck. tapioca, 15 to 25 lbs.; 1 dz. ¼-lb. mustard, ¾ dz. ¼-lb. mustard; 2⅝ dz. asst. spices, 2 oz.; ½ dz. asst. coffee, 1½ dz. pckgs. Java coffee, 1 1/12 dz. bots. mustard, 16 lbs. cocoanut; 1 9/12 dz. pcks. hops, 2 oz.; 1 doz. lemon extract, 1 5/12 dz. bots. gherkins, 1 7/12 doz. Ring pepper sauce, ½ dz. L. P. Worst. sauce; 1 dz. tomato catsup, qts.; 3 pts. Angustora bitters, 3 pts. Sonoma wine, 3 qts. B. D. kumell, 5 pts. Stoughton bitters; 1⅙ dz. Brunett's yeast, 6 oz.; 1½ dz. Brunett's yeast, 6 oz.; 2¼ dz. S. & T. yeast, 4 oz.; ¼ dz. Boss yeast, 5 oz.; 6 lbs. corn-starch, 8 pkgs. hops, 4 lbs. D. G. starch, 11 lbs. S. G. starch,
9 8 bots. tinct. arnica, 2 oz.; 8 bots. coal oil, 2 oz.; 3 bots. ment. argurment, 2 oz.; 3 bots. pain-killer, 6 bots. laudanum, 1 oz.; 2 bots. glycerine, 2 bots. German blue, ½ lb.; 27 small jars Arnold ink, 7 boxes camphor ice, 7 boxes Brown troches, 5 b'x's asst. pills, 5 boxes Russian salve, 10 p'k'gs catarrh remedy, 2 p'ck'g stove polish, 41 asst. pipes, 20 bots. high wine, 2 bots. H. H. H. medicine, 6 bots. sarsaparilla, 5 bots. Hale's balsom, 1 dz. bot. Bucker, 2 bots. Ex. Jama-cia ginger, 5 bots. oil almonds, ½ dz. hatchets, 7 brooms, 56 asst. pipes, ½ b'x cigars (50), 7 large box. blacking, 7 boxes medium black-

ing, 8 dz. asst. tacks, 5 boxes screws, ass't'd sizes; 7 hunter's knives, 2 kits mackeral, 14 bts. champaigne (pts.), 59 bacon hams, 1 s'ck prunes, 2 gals. liquor, 10 gals. vinegar.

3. That the defendants, on the 31st day of March, A. D. 1879, at the town of Vestel, in said Deer Lodge county, without the plaintiffs' consent, and wrongfully took the said goods & chattels from the possession of the plaintiffs.

4. That before the commencement of this action, to wit, on
10 the fourth day of April, 1879, — demanded of the defendants possession of the said goods and chattels.

5. That the defendants still unlawfully hold and detain said goods and chattels from the possession of the plaintiffs, to their damage in the sum of five hundred dollars.

Wherefore the plaintiffs demand judgment against the defendants—

First. For the recovery of said goods and chattels or for the sum of thirty-four hundred dollars, the value thereof, in case a delivery cannot be had, together with interest thereon from the — day of March, A. D. 1879.

2. For five hundred dollars damages, and for costs of suit.

SANDERS & CULLEN &
CHUMASERO & CHADWICK,
Plaintiffs' Attorneys.

TERRITORY OF MONTANA, }
Lewis & Clarke County, } *ss:*

Albert Kleinschmidt, being duly sworn, says: He is one of the plaintiffs named in the above-entitled suit; that he has heard
11 the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALBERT KLEINSCHMIDT.

Subscribed and sworn to before me, this 5th day of April, A. D. 1879.

W. E. CULLEN,
Notary Public, M. T.

And on the 15th day of December, A. D. 1879, the defendants filed their answer to said complaint, which is as follows, to wit:

Answer.

In the District Court, First Judicial District, Lewis & Clarke County, Montana Territory.

ALBERT KLEINSCHMIDT, REINHARD KLEINSCHMIDT, CORNELIUS L. VAWTER, MOSES MORRIS, DAVID MORRIS, HENRY M. PARCHEN, HARRY D'ACHEUL, CHARLES LEHMAN, JOHN KINNA, WILLIAM JACK, ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, & N. H. WEBSTER, Plaintiffs,

versus

12 JAMES S. MCANDREWS and JOHN S. BRISTOL, Defendants.

1. Now come the defendants, and for answer to the complaint of

the plaintiffs herein deny: That the said plaintiffs, or either of them, on the 30th day of March, A. D. 1879, or at any other time, were the owners of the property described in their said complaint, or any part thereof.

2. Deny that on the 31st of March, A. D. 1879, or at any other time, said defendants, or either of them, at the place in plaintiffs' complaint mentioned, or elsewhere, took the goods and chattels in their complaint described, or any part of the same, from the possession of the plaintiffs, or either of them.

3. Deny that the defendants, or either of them, still detain the same from the possession of said plaintiffs, or either of them, to their damage in the sum of five hundred dollars or any other sum.

And the said defendants, further answering, aver the facts
13 to be that on the 31st day of March, A. D. 1879, one John S. Bristol commenced an action in the district court of the third judicial district, Lewis and Clarke county, Montana Territory, against one Alson E. Ingersoll upon an implied contract for the payment of money, claiming that there was then due and owing to the said Bristol the sum of fourteen thousand eight hundred dollars; that said court was then and there a court of competent jurisdiction; that thereafter, to wit, on the 31st day of March, A. D. 1879, a writ of attachment duly issued out of the clerk's office of said court in said cause, directed to James S. McAndrews, who was then and there the duly elected, qualified, and acting sheriff of Deer Lodge county, Montana Territory, commanding and directing the said McAndrews, as such sheriff, to attach and safely keep sufficient of the goods and chattels of said defendant Ingersoll, if the same could be found in his county, as a security for any judgment that might be recovered against said Ingersoll.

That in pursuance of said writ of attachment the said James S. McAndrews, as such sheriff, did find the said property de-
14 scribed in plaintiffs' complaint within his said county and in the possession of the said Ingersoll, which said property was then and there the property, goods, and chattels of said Ingersoll; and the said James S. McAndrews, as such sheriff, in pursuance thereof, did levy upon the same on the 31st day of March, A. D. 1879, and then and there take the same into his possession, and that such taking, as defendants are informed and believe, constitute the wrongs and grievances complained of by the said plaintiffs.

That said plaintiffs are now in the possession of said goods under and by virtue of the stipulation filed in this cause, and by reason of the proceedings had therein.

Wherefore defendants pray judgment against said plaintiffs for the return of said goods if a return thereof can be had, or for the sum of thirty-four hundred dollars, the value thereof, and for their costs of suit; & that said plaintiffs account for the said goods and book accounts as in their stipulation agreed.

E. W. & J. K. TOOLE,
Defendants' Attorneys.

15 TERRITORY OF MONTANA, *Lewis & Clarke County:*

John S. Bristol makes oath and says: He is one of the defendants in the above-entitled cause and agent for his co-defendant; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, & as to those matters he believes it to be true.

JOHN S. BRISTOL.

Subscribed and sworn to before me, this 9th day of December, A. D. 1879.

JOSEPH K. TOOLE,
Notary Public.

And on the second day of March, A. D. 1880, the plaintiffs filed their replication thereto, which is as follows, to wit:

Replication.

In District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

16 ALBERT KLEINSCHMIDT *et al. vs.* JAMES S. MCANDREWS *et al.*

Now come the plaintiffs, and for replication to the new matter set up in defendants' answer herein—

1. Deny that the said James S. McAndrews, the above-named defendant, as such sheriff, or otherwise, did find the property mentioned in plaintiffs' complaint herein in the possession of said Alson E. Ingersoll, but, on the contrary, aver that at the time of the levy of said attachment the said goods and chattels were in the possession of these plaintiffs, who were the owners of the same.

2. Deny that at the date of the levy of the said attachment the said goods were the property of said Alson E. Ingersoll; and deny that he is now, or was at any time since the 29th day of March, A. D. 1879, the owner of said goods, wares, or merchandise, or any thereof; and deny that he had any attachable interest, or any interest of any kind or character, in or to said goods, or any thereof.

17 Where[fore] plaintiffs pray that they be adjudged the owners of said goods, and have judgment for one dollar, their damages, and costs of suit.

CHUMASERO & CHADWICK,
SANDERS & CULLEN,
For Plaintiffs.

MONTANA TERRITORY, }
Lewis & Clarke County, } *ss:*

Albert Kleinschmidt, being first duly sworn, says: That he is one of the plaintiffs mentioned in the foregoing action; that he has heard read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge, except as to matters

stated on his information and belief, and that as to such matters he believes it to be true.

ALBERT KLEINSCHMIDT.

Subscribed and sworn to before me, this 2nd day of March, A. D. 1880.

W. J. CULLEN,
Notary Public, M. T.

18 And on the 22nd day of March, A. D. 1880, the plaintiffs, by leave of the court, filed an amendment to said complaint, which is as follows, to wit:

Amendment to Complaint.

In District Court, 3rd Jud. District, Montana Territory.

ALBERT KLEINSCHMIDT *et al. vs.* JAMES S. MCANDREWS *et al.*

And now come the plaintiffs, and, by leave of the court for that purpose first had and obtained, files the following amendment to their complaint filed herein:

After paragraph 2, and at the end of the description of the goods described in said complaint, and immediately before section number 3, insert as follows, to wit:

"2½." That on the said 29th day of March, A. D. 1879, the said plaintiffs were creditors of one Alson E. Ingersoll in the sum and to the amount of four thousand dollars; that on said day the said Alson E. Ingersoll, at the said town of Vestel, was the owner and possessor of the said goods & chattels, and that on the said 29th
19 day of March, 1879, the said Alson E. Ingersoll sold said goods, &c., to said plaintiffs, with authority to sell the same, and from the proceeds thereof to pay *pro rata* to said plaintiffs, severally, until said Ingersoll's debts to plaintiffs were paid, and said debts on said 31st day of March, 1879, were and yet remain unpaid. And on the 30th day of March, 1879, the possession of said goods was in plaintiffs, and there remained until the wrongful taking and detention by the defendants as herein alleged.

SANDERS & CULLEN,
CHUMASERO & CHADWICK,
Att'ys for Plaintiffs.

TERRITORY OF MONTANA, *County of Lewis & Clarke:*

Albert Kleinschmidt, being first duly sworn, says: He has heard the foregoing amendment read, and knows the contents thereof; that the facts therein stated are true of his own knowledge.

ALBERT KLEINSCHMIDT.

Subscribed and sworn to before me, this 22d day of March, 1880.

A. H. BEATTIE, *Clerk.*

20 And by agreement the answer to the said amendment to said complaint was considered as filed, and should be filed

nunc pro tunc; which said answer thereto so filed is in the words & figures following, to wit:

Answer to Amended Complaint.

3d Judicial Dist. Court Lewis & Clarke County, M. T.

ALBERT KLEINSCHMIDT *et al. vs.* JAMES S. MCANDREWS *et al.*

Now come the defendants, and for answer to the amended complaint of the plaintiffs herein denies that said plaintiffs were on the 31st day of March, 1879, in possession of or entitled to the possession of said goods & property, or that they were or are entitled to the same. They admit that said Ingersoll was the owner thereof and in possession of the same up to the alleged possession thereof by the plaintiffs on the 30th of March, A. D. 1879. And the said defendants, for a further answer to said amendment to said complaint, say that the said Bristol was and still is a creditor of said Ingersoll; that as such he caused to be levied the attachment
21 in his original answer set up; that after the execution and delivery of the said bill of sale or assignment the said property, according to the best information and belief of defendants, remained in the possession of said Ingersoll until the succeeding day, whereby the terms of an oral agreement between said plaintiffs and said Ingersoll the said goods were to be delivered to said plaintiffs; but these defendants deny that such possession was ever delivered or received in pursuance thereof, or at any time before the attachment of said property as aforesaid.

And defendants further say that during the time intervening between the said "bill of sale" and the time at which the plaintiffs claim to have taken possession of said property under the arrangement and oral contract aforesaid and the execution and delivery of the bill of sale and assignment aforesaid, the same was void as against the said Bristol as such creditor, and that by reason of the levy aforesaid the said defendants became & still are entitled to the possession of said property. Deny that plaintiffs ever took
22 or remained in possession of said property for or at any time.

E. W. & J. K. TOOLE,
Att'ys for Defendants.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

John S. Bristol makes oath and says: That he has read the foregoing answer to the amendment to plaintiffs' complaint, knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

JOHN S. BRISTOL.

Subscribed and sworn to before me, this 22nd day of March, A. D. 1880.

JOSEPH K. TOOLE,
Notary Public.

And on the 22nd day of March, 1880, this cause came on to be tried at the present March term of this court, A. D. 1880, before the court and a jury; whereupon the plaintiffs, to sustain the
23 issues on their part, introduced the following evidence to the jury:

First. A bill of sale or instrument in writing, which is as follows:

Bill of Sale.

For value received I hereby sell, assign, and transfer to Kleinschmidt & Bro., C. L. Vawter, Greenhood, Bohm & Co., Parchen and D'Achaeul, and Kinna & Jack, Morris & Bro., N. H. Webster, and Charles Lehman the whole of the goods, wares, merchandise, and personal property now in my store, in the town of Vestel, Deer Lodge county, M. T., and also all of the debts due and owing to me for merchandise sold from said store from all persons whomsoever, to hold to them or their assigns, and to sell and dispose of the same and apply the proceeds *pro rata* to the payment of the indebtedness due from me to the persons above named until the amounts due to them shall be paid.

Helena, March 29th, 1879.

A. E. INGERSOLL.

Witness—
WILLIAM CHUMASERO.

24 It was mutually agreed between the parties that the goods and chattels mentioned and described in the complaint were the identical goods, &c., which were intended to be conveyed by the bill of sale to plaintiffs, and that the only question to be tried and determined in the case were, first, the ownership of the property in dispute, and who was entitled to the possession of said property, said plaintiffs or said defendants, McAndrews, as sheriff, by virtue of the attachment mentioned in the pleadings, on account of the process caused to be issued by said Bristol as a creditor of said Ingersoll; and, second, the possession thereof at the time of the taking possession of the same by the defendant, James S. McAndrews, as sheriff of the county of Deer Lodge, Montana Territory. And plaintiffs, without objection, introduced and read to the jury the following stipulation:

Stipulation.

Title of Cause. Name of Court.

It is hereby stipulated between the parties in the above-entitled action—

25 1. That the *ad damnum* clause of the complaint shall be amended by striking out $500.00 and inserting in lieu thereof one dollar.

2. That plaintiffs will sell and dispose of the goods mentioned in said complaint at the best price obtainable therefor; and, in case judgment in said cause shall be rendered against said plaintiffs, they will account to defendants for whatever may be realized from

said goods, and, if sold to T. H. Clewell in bulk, the price so paid by said party to be taken and decreed the value of said goods.

3. Defendants, on their part, agree and stipulate to appear in said action within twenty days, and make no objection to the venue of said suit, to claim no damages in the answer, except the value of the goods, and to surrender goods mentioned in the complaint herein to plaintiffs, to be by them sold as aforesaid.

4. It is also further stipulated on the part of plaintiffs that the book accounts owing to A. E. Ingersoll and claimed to be assigned to plaintiffs herein shall be included in the inventory attached to the complaint herein, and the amounts which can be collected
26 thereon shall also be accounted for by the plaintiffs to defendants in the event that defendants shall recover judgment in this action.

A. KLEINSCHMIDT.
C. L. VAWTER.
CHUMASERO & CHADWICK,
SANDERS & CULLEN,
Att'ys for Plaintiffs.
E. W. & J. K. TOOLE,
Def'ts' Attorneys.

The plaintiffs then called as a witness ALBERT KLEINSCHMIDT, who testified as follows, viz:

That witness saw Alson E. Ingersoll, who executed the said "bill of sale," at 9 or 10 o'clock p. m. of the 29th day of March, 1879, in the office of Messrs. Sanders and Cullen, in Helena; that he, C. L. Vawter, and others of the plaintiffs were there to see if they could collect from Ingersoll the amounts respectively due them from said Ingersoll or obtain security therefor; that Ingersoll executed and gave them the bill of sale of the goods, and that they were to take possession of the goods, &c., and sell them and apply on their said indebtedness as
27 far as they would go; that witness immediately went, after having possession of the bill of sale, and got Mr. Henry Wiseman, and gave him the bill of sale, with instructions to go at once and take possession of the goods. This was on Saturday night. On Monday, the 31st March, I went to Vestel, and got there at 10 o'clock in the forenoon; saw Wiseman & Dave Stevenson. Wiseman gave me money for the goods he had sold on Sunday, and Stephenson gave me the money for goods he had sold on Saturday. I saw Mr. L. P. Smith, who was under-sheriff of the defendant, McAndrews, there, and he told me he was going to make an inventory of the goods in the store. The goods were sold to Til Clewell for about $3,000.00, but have not yet been paid for. The goods were sold for eighty per cent. of the amount due the plaintiffs from Ingersoll. The amount of the indebtedness of Ingersoll to the plaintiffs was about thirty-four hundred dollars. The goods were sold in bulk to Clewell for something over three thousand dollars; don't remember the ex-
28 act amount. As to the accounts due Ingersoll, I do not know the amount of them or the amount that has been collected. Mr. Clewell is doing the collecting.

HENRY WISEMAN was then sworn as a witness for plaintiffs and testified:

That he first saw the bill of sale on Saturday night, between 9 & 10 o'clock; that he received it from Kleinschmidt, with instructions to take the bill of sale & go immediately to Vestel and take possession and charge of the goods. I went, and got to Vestel between three and four o'clock Sunday morning, leaving Helena about half-past ten o'clock Saturday night. I found Stevenson in charge under E. Ingersoll, the brother of Alson E. Ingersoll. Mr. Smith, who was, as I understand, under-sheriff of Deer Lodge county, came there on Monday. I showed him the bill of sale and told him I had possession of the store. He said he should take an inventory; that the paper I showed him was only a bill of sale. When I went up first I showed Stephenson the bill of sale, and told him that I came there to take possession under the bill of sale. He made no
29 objection, and showed me where the book's were, and I took them. I then told Stevenson that my orders were to sell goods only for cash, and did so. Stevenson did not sell goods after I got there; when Kleinschmidt came up he paid him over the money he had taken in on Saturday, and I paid him the money I had taken in on Sunday. I wrote two notices after I got there, and put one on each counter, that we were "selling for cash only."

Kleinschmidt told Stevenson that he would pay him for what he had done. I don't remember whether the sheriff staid over night; think not; after sheriff left I continued to sell goods. Kleinschmidt told the sheriff that when he came to Helena he would fix it up, or something like that.

Cross-examination:

On cross-examination witness testified:

Kleinschmidt told me if the sheriff came to show him the bill of sale, and I did so. When I got there Stevenson was in bed. I knocked some time before he got up; he showed me where the
30 books were; he made no objection to my taking possession; I told him I had come to take charge of the store; he made no objection; gave me the books, and I supposed it was all right; he told me where everything was; I was in possession & in charge when Smith, the sheriff, came; no one else was present but Smith and myself. Stevenson said he would sleep there. When Kleinschmidt came up he told Stevenson he would pay him; that he would leave me in charge, and that Stevenson should assist me, and he would pay him.

Redirect:

Stevenson was only there as a clerk for Ingersoll till he returned. Kleinschmidt had actual possession from Saturday night until Thursday following. I was Kleinschmidt's agent; when the sheriff came back Thursday he appointed Stevenson deputy. Stevenson never claimed that he had not delivered possession to me; the first I heard that he ever made such claim was on Thursday.

ALBERT KLEINSCHMIDT was then recalled, and testified as follows, viz:

31 Alson E. Ingersoll, at the time he gave the bill of sale, told me that as the goods had been purchased from the plaintiffs and the indebtedness was for the purchase-money, I had better go and take possession immediately. The goods were in Vestel and the bill of sale was given in Helena, 23 miles from Vestel. Ingersoll was under arrest at the time.

ALSON E. INGERSOLL was then called as a witness, and testified as follows:

I never gave Stevenson any instructions to withhold possession of the goods after the execution of the bill of sale; if he did, it was contrary to my instructions. The post office was kept in the same building by my consent. Kleinschmidt owned the building. I rented from him.

The whole evidence on the part of the plaintiffs showed that the bill of sale referred to was executed by Ingersoll and delivered to plaintiff in the office of Sanders & Cullen, in Helena city, in Lewis and Clarke county, M. T., about 9 o'clock p. m. on the 29th day of March, A. D. 1879; that the goods, &c., were in possession of
32 Stevenson, his clerk, at Vestel, in the county of Deer Lodge, about 23 miles distant; that after the writing mentioned was delivered to plaintiff, as aforesaid, it was expressly agreed that plaintiffs should go out to Vestel and get possession of said property, and that said Stevenson should turn said property over to them; that said plaintiffs went at once and sent an agent with said "bill of sale" to Vestel; and the evidence was sufficient to go to the jury, and tended to show that he took possession of said property about 4 o'clock on the morning of the 30th of March, being the following morning after the execution and delivery of said writing; that he took with him said writing, exhibited it to said Stevenson, then in possession as clerk of said Ingersoll, and that he made no objection, but delivered him (said agent) the property aforesaid, being the property in controversy, and that the said Stevenson, the said clerk of Ingersoll, after said agent of plaintiffs so had possession, remained with and assisted said agent until the levy of the attachment
33 by the sheriff on the 31st of said March; that the plaintiffs and defendant Bristol during this time were creditors of the said Ingersoll for the purposes of this trial was mutually agreed and conceded as a fact on the trial, and so entered accordingly as an admission.

The plaintiffs then rested their case; whereupon the defendants made and filed their motion for nonsuit, which is as follows, to wit:

Motion for Nonsuit.

Title of Cause. Name of Court.

Now come the defendants and move the court for a nonsuit

herein and for an order for the return of the property or the value thereof, as per stipulation filed & introduced in evidence, for the following reasons:

1. There is no sufficient case made out so as to authorize the submission of the same to the jury.

2. The evidence shows that the plaintiffs were special owners in the property & not general owners, which was objected to for such reason.

3. The evidence and pleadings show that the goods and property mentioned were 23 miles distant from the place where the
34 bill of sale was made; that no immediate delivery of possession or change of possession accompanied the same, and that Ingersoll, by his clerk, was in the possession at the time of the sale or assignment, and remained so until the following morning, and that said Bristol was, during all this time, a creditor of said Ingersoll.

4. The evidence shows that there was no immediate change of possession accompanying the "bill of sale," or assignment of said property, and that in the mean time, between the execution thereof and the taking of such possession, if any was taken, defendant Bristol was a creditor of said Ingersoll, and his attachment duly levied on the thirty-first day of March, A. D. 1879.

5. The evidence shows that Ingersoll made the transfer or assignment with intent to defraud and delay said Bristol in the collection of his claim, and that plaintiffs had notice thereof.

6. The evidence does not show that an open, visible, and notorious possession was taken by, or that the clerk or servant of Ingersoll ever delivered up the same or acted in said business as clerk
35 or servant of plaintiffs, or in any capacity, except clerk or servant for Ingersoll, prior to and up to the time of the levy.

E. W. & J. K. TOOLE,
Att'ys for Defendants.

Which said motion was, after argument, duly submitted to the court, who thereupon granted the said motion and directed judgment to be entered in favor of the defendants & against the plaintiffs. To which ruling of the court the plaintiffs then and there duly excepted; and thereupon judgment was entered in the case as follows, to wit:

Judgment of Nonsuit.

Name of Court. Title of Cause.

This action came regularly on for trial. The said parties appeared by their respective counsel. A jury of twelve persons was duly empaneled and sworn to try said action. Witnesses on the part of plaintiffs were duly sworn and examined After the said plaintiffs had closed their case said cause was heard upon defendants' motion for a nonsuit and duly submitted to the court
36 for consideration and decision, and after consideration thereon the court sustains said motion and orders judgment for the

defendants accordingly. Wherefore by virtue of the law & by reason of the premises aforesaid it is ordered, adjudged, and decreed that the said defendants do have and recover of and from said plaintiffs all the property in the complaint, affidavit, and pleadings in this action described, or, in case possession of said property cannot be had, the value thereof in accordance with a certain stipulation filed herein April 11, 1879, and introduced in evidence herein, and that they recover their costs in this cause expended, taxed at the sum of $63.50.

Judgment entered March 22d, A. D. 1880.

To the entry of which said judgment the plaintiffs then and there excepted, and ask the court to sign this bill of exceptions, and that the same be made part of the record, which is done accordingly this 22d day of March, A. D. 1880.

(Signed) D. S. WADE, *Judge.*

37 And afterwards, to wit, on the 13th day of July, A. D. 1880, the said plaintiffs filed herein their notice of appeal, of which in words and figures the following is a copy, to wit:

Notice of Appeal.

In the District Court, Third Judicial District of the Territory of Montana, in & for the County of Lewis & Clarke.

ALBERT KLEINSCHMIDT *et al.*, Plaintiffs,
vs.
JAMES S. MCANDREWS and JOHN S. BRISTOL, Defendants.

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment therein made & entered in the said district court at the March term thereof, 1880, in favor of the defendants in said action, and against said plaintiffs, & from the whole thereof.

Dated this twelfth day of July, A. D. 1880.

Yours, &c., CHUMASERO & CHADWICK & SANDERS & CULLEN,
Attorneys for Plaintiffs.

38 To the clerk of said district court, and Toole & Toole, attorneys for defendants.

Copy of the above notice waived this 12th day of July, A. D. 1880.
E. W. & J. K. TOOLE,
Def'ts' Attorneys.

And on the same day, to wit, on the 13th day of July, A. D. 1880, said plaintiffs filed herein their undertaking on appeal, of which in words and figures the following is a copy, to wit:

Undertaking on Appeal.

In the District Court of the Third Judicial District of the Territory of Montana, in and for the County of Lewis and Clarke.

ALBERT KLEINSCHMIDT *et al.*, Plaintiffs,
vs.
JAMES S. MCANDREWS and JOHN S. BRISTOL, Defendants.

Whereas the plaintiffs in the above-entitled action have taken, or are about to take, an appeal to the supreme court of the Ter-
39 ritory of Montana from a judgment made & entered against them in said action in the said dist. court, in favor of the defendants in said action, at the March term, A. D. 1880, of the said district court:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Lewis Hillebrecht and Carl Kleinschmidt, of the county of Lewis & Clarke, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will prosecute their appeal with effect, and will pay all damages & costs which may be awarded against appellants on the trial of the appeal or on a dismissal thereof not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred dollars, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, or
40 the appeal dismissed, the appellants will pay to said defendants the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on the appeal.

Dated this 12th day of July, A. D. 1880.

LOUIS HILLEBRECHT. [SEAL.]
CARL KLEINSCHMIDT. [SEAL.]

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

Louis Hillebrecht & Carl Kleinschmidt, the persons named in & who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is worth the amount specified in said undertaking as the penalty thereof over & above all his just debts & liabilities, exclusive of property exempt from execution, & that he is a resident & householder or freeholder within the Territory of Montana.

LOUIS HILLEBRECHT.
CARL KLEINSCHMIDT.

Subscribed & sworn to before me, this 12th day of July, A. D. 1880.

WM. CHUMASERO,
Notary Public.

41 In the District Court, 3d Judicial District, Lewis & Clarke County, Montana Territory.

ALBERT KLEINSCHMIDT *et al. vs.* JAMES S. MCANDREWS *et al.*

I, Alex. H. Beattie, clerk of the said district court, do hereby certify that the foregoing 40 pages, numbered from one to forty, inclusive, contain a full, true, and correct transcript of certain pleadings, records, & proceedings filed, made, and had in said court in the above-entitled cause, as the same are of record and on file in my office.

In testimony whereof I have hereunto set my hand & affixed my official seal this 13th day of July, A. D. 1880.

[Seal of Dist. Court.] A. H. BEATTIE, *Clerk*,
By J. R. ALDEN,
Deputy Clerk.

42 In the Supreme Court of Montana Territory. January Term, A. D. 1881.

ALBERT KLEINSCHMIDT *et al.*, Appellants,
vs.
JAMES S. MCANDREWS & JOHN S. BRISTOL, Respondents.

Be it remembered that in the present term of January, A. D. 1881, the above-entitled cause was brought on to be heard before said court on the transcript of the record of the court below in said cause, which was brought into this court by virtue of an appeal taken according to law, and was argued by counsel; whereupon, on due consideration of the case, the court rendered its decision herein, and delivered its opinion in writing, of which, in words and figures, the following is a copy, viz:

43 In the Supreme Court of the Territory of Montana. January Term, 1881.

ALBERT KLEINSCHMIDT *et al.*, Appellants,
vs.
JAMES S. MCANDREWS and JOHN S. BRISTOL, Respondents.

Opinion of the court by GALBRAITH, Justice:

This is an appeal from a judgment directed to be entered by the court in pursuance of its action in granting a motion for a nonsuit. The transcript, in addition to papers constituting the judgment-roll in the case, contains an agreement between the parties in relation to what questions should be tried, a stipulation in relation to an amendment of the *ad damnum* cause of the complaint, the disposition of the property, and other matters between the attorneys in the

case, and also certain evidence introduced upon the trial (which was to a jury) by the plaintiffs. Neither the agreement, the stipulation, or the evidence are expressly made a part of or expressly
44 stated in any bill of exceptions, but are simply certified to by the clerk as being a "full, true, and correct transcript of certain records and proceedings filed, made, and had in said court in the above-entitled cause as the same are of record and filed in my office." Therefore the above agreement, stipulation, and evidence do not constitute any part of the judgment-roll, not having been made a part of or stated with a bill of exceptions, excepting that part of the stipulation which relates to the amendment of the complaint. This may be considered a part of the judgment-roll, as constituting a portion of the pleadings. It is contended on the part of appellants that the power to make any of its proceedings under the hand and seal of the judge a part of the record is inherent in courts, independent of statutes. Be this as it may, nevertheless, when the law-making power has denominated what shall constitute the judgment-roll, this court will not assume to add to or detract from its specifications in relation thereto. An exception is designated by the statute as being "an objection taken at the trial to a de-
45 cision upon a matter of law at any time from the calling of the action for trial to the rendering of the verdict or decision." Sec. 279 of the Code of Civil Procedure.

Sec. 294 of the same act also provides what papers shall constitute the judgment-roll, and among them specifies "all bills of exception taken and filed in said action." The exception taken by the appellant to the ruling of the court sustaining the motion for a nonsuit, and directing judgment to be entered in favor of the defendants, could not, in the very nature of the case, be an exception within the meaning of the above provisions, and therefore is no part of the judgment-roll. It could not have been taken until after the rendition of the decision of the court. But granting, for the sake of argument, that the above bill of exceptions does constitute a part of the judgment-roll, nevertheless the evidence and other matters contained in the agreement and stipulation, so far as they relate to the motion for a nonsuit, cannot be considered in connection with such bill of exceptions. The bill of exceptions is as follows, viz:
46 "To the entry of which said judgment the plaintiff then and there excepted, and asked the court to sign this bill of exceptions, and that the same be made part of the record, which is done accordingly, this 22d day of March, 1880.

(Signed) D. S. WADE, *Judge*."

Sec. 282 of the Code of Civil Procedure requires that "the objection shall be stated with so much of the evidence or other matter as is necessary to explain it." Section 281 requires that "the point of the exception shall be particularly stated, * * * and may be delivered in writing to the judge. * * When delivered in writing * * * it shall be made conformable to the truth, or be at the time corrected until it be made so conformable." From these sections we must conclude that the particular facts, whether evidence

or other matter upon which the court rules, are intended to be presented in the bill of exceptions. It is apparent that it is principally for this reason that it is made the duty of the court to settle the exception, or, in the language of the statute, "to correct it when delivered in writing, until it shall be made conformable to the truth."

47 That the Code of Civil Procedure intends that the bill of exceptions shall contain the evidence or other matter upon which the alleged objectionable ruling of the court is made is also evident from the fact that the only kind of papers specified among those constituting the judgment-roll which could possibly contain the evidence are bills of exception. The Code of Civil Procedure contemplates an appeal from the judgment in which the judgment-roll alone may be considered. This is when there is no statement annexed to the judgment-roll. The provisions of the California practice act, in respect to the method of presenting the action of the court below for review, are almost identical with those of our Code of Civil Procedure. In reference to this subject, in Wetherbee *vs.* Carroll, 33 Cal., p. 549, Sawyer, J., giving the opinion, says: "The judgment-roll is itself a record for an appeal, and there may be no occasion for anything further to present the question raised." But it has been settled from an early day that an appeal from a judgment without a statement, nothing is brought up, or is

48 a part of the record on appeal, except the judgment-roll, and no question arising outside of the roll can be considered. If any further record is required, it must be in the form of a statement. Also in relation to exceptions in the same case the same judge says: "They are the only exceptions or bills of exception known to our practice act, except so far as a ruling and exception to it, presented by a statement made in the mode prescribed by that act, may be regarded as a bill of exceptions."

(King *vs.* Gambert, 32 Cal., 304.)

The reasons upon which this restriction of the cases for exceptions and for the mode prescribed for taking them seem obvious enough. At the trial both parties are present, and in settling the exception can be heard. Each party can see that everything necessary to a presentation of the entire merits on both sides is introduced.

"The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." (Sec. 190.) (Our Code of Civil Procedure, sec. 282.) "The parties have the same opportunity for securing a correct presentation of the exception as

49 is offered in settling a statement. The only other mode of making up anything like or answering to a bill of exceptions is by a statement prepared in the manner prescribed by the practice act, in the preparation of which both sides are also heard. The policy of the act is that whenever there is a possibility that a partial record for presenting a point may be made both parties shall have an opportunity to take part in settling it; and the two modes prescribed are by settling the exception during the progress of the trial, in the presence of both parties, and annexing it to the judg-

ment-roll; the other, by a subsequent statement in the mode designated, afford- an orderly and convenient mode of accomplishing that end."

The above language is quoted as being expressive of our own views in relation to our practice in appeals. It will be observed that the above bill of exceptions does not contain, nor is it stated with any evidence or other matter contained in the transcript. It does not refer in any manner to any such evidence or matter. It does not appear from the bill of exceptions, or even from the tran-
50 script, that the evidence which the transcript contains was all the evidence upon which the court ruled, or that it was settled by the judge, or that both parties had the same opportunity for hearing a correct presentation or took part in the settlement thereof. We must, therefore, conclude that the evidence set forth in the transcript is not any part of the bill of exceptions, and, therefore, no part of the judgment-roll. The transcript does not show any compliance with, or attempt to comply with, section 419 of the Code of Civil Procedure, in relation to statements on appeal. There is, therefore, no such statement.

If, therefore, the appellants rely upon their bill of exceptions the evidence cannot be considered in connection therewith, for it is not any part of the judgment-roll. If they rely upon the other position taken in their brief, that the final decision in the case is deemed to have been excepted to, and that the granting of the nonsuit was such decision, then both for the reasons that the evidence is no part of the judgment-roll, and that there is no statement on appeal, the evidence cannot be considered.

51 The bill of exceptions is also defective, in that it does not particularly state the point of the exception as required by section 281 of the Code of Civil Procedure. We can see no error in the judgment-roll. When nothing appears to the contrary, the decision of the court will be presumed to be correct. Therefore, when the court grants a nonsuit, and the evidence introduced does not appear or cannot be considered, it will be presumed that the plaintiff failed to prove a sufficient case for a jury. The above reasons are sufficient for the dismissal of the appeal. But in order to aid in the settlement of the practice, some other questions presented by the arguments of counsel will be properly considered. It is argued by appellants that under the organic act they are entitled to have the cause reviewed upon the showing made by the transcript, notwithstanding the provisions of the Code of Civil Procedure in relation to appeals. According to appellant's brief, the provisions of the organic act which is relied upon to support this position is as follows: "Bills of exceptions & appeals shall be allowed in all cases from the final decisions of said district courts to the
52 supreme court." It will be seen by reference to section 9 of said act, containing the above language, that the sentence in which the same appears concludes with the additional language: "Under such regulations as may be prescribed by law." The same instrument also provides for a Legislative Assembly. The words "such regulations as may be prescribed by law" refer to regula-

tions to be made by the Legislative Assembly of the Territory. Under this provision the Legislative Assembly may fix the times and prescribe the methods by which appeals may be taken, so long as such regulations do not amount to a denial of the right conferred by the organic act. The provision of the Legislative Assembly in relation to appeals are reasonable and sufficient for that purpose. The organic act is not, therefore, infringed by requiring the appellants to comply with the provisions of the Code of Civil Procedure in relation to the method therein prescribed regulating appeals. It is also contended by respondents that a motion for a new trial was necessary, and that therefore the evidence should have been presented in a statement on such a motion.

53 Section 284 of the Code of Civil Procedure defines a new trial as "a re-examination of an issue of fact in the same court after a trial & decision by a jury, court, or referee." It contemplates, therefore, a case in which evidence has been submitted to, and has been passed upon, by the proper tribunal provided by law to try an issue of fact. By section 241 of the Code of Civil Procedure "the trial of an issue of fact must be by a jury, except an action which involves the settlement of accounts, unless waived by the parties." A judgment of nonsuit may be entered under the 5th subdivision of sec. 234 of the said act "by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." The jury, therefore, which, under the law, is the tribunal chosen to try the cause, is prevented therefrom by the action of the court, not acting or having authority to try the issue, but, by reason of its general powers as a court, to try matters of law, as well as by the express provision of said subdivision of section 234. There never was, therefore, a trial of the issue by the proper tribunal, and therefore a motion for a new trial is

54 not, in such a case, contemplated by the Code. There never was a trial by the jury, because in the judgment of the court "the plaintiff failed to prove a case for the jury." There was not a trial by the court, because a jury was not waived, but was the tribunal chosen to try the issue. It was, therefore, by virtue of its power as judge of the law applied to the evidence introduced by plaintiff, that the court granted the motion of nonsuit and took the case from the jury. This may perhaps be better illustrated by reference to the practice which obtained in England in the same character of cases. Under the practice which is now provided for by said subdivision of section 234 in relation to nonsuit [it] was taken advantage of by what was called a demurrer to evidence. This took place when a party disputed the legal effect of the evidence offered. It was analogous to a demurrer in pleading. It was a virtual declaration by the party from whom it came that he would not proceed because the evidence offered on the other side was not sufficient to maintain the issue.

Stephens on Pleadings, p. 90.

55 The motion for a nonsuit under the subdivision of sec. 234 and the demurrer to evidence, if not precisely similar,

bear a close analogy. "A demurrer to evidence is analogous to a demurrer in pleading." Same reference. We are therefore led to conclude that the action of the court in granting a nonsuit, upon the ground that the plaintiff has failed to prove a sufficient case for a jury, is as much a decision upon a matter of law as its action in sustaining a demurrer to a pleading. Such a decision does not, therefore, come within the meaning of a trial as defined by the Code, and such a motion could not, therefore, be properly made as a part of the proceedings necessary to present this case for review upon the evidence already in the case. It is desirable that a uniform practice should be enforced. The statute has provided such a method adapted to the different kinds of judicial proceedings. The only practical mode of securing uniformity in the practice is by requiring a strict observance to these methods. For the purpose of aiding in the furtherance of this object we will now
56 say that in our opinion the method to be pursued in bringing up the evidence in such cases as the one at bar for review is by statement upon appeal. A statement on motion for a new trial is improper, as such a motion, after granting a nonsuit for the reason that the plaintiff has failed to prove a sufficient case for a jury, is not contemplated by the statute. The objection to the action of the court in granting such nonsuit cannot be made until after the rendition of the decision, and such objection is not an exception, as that term is defined by the statute. The evidence can only be made a part of the judgment-roll by having it settled in a bill of exceptions. In a case where such motion for nonsuit is refused, we are of the opinion that the evidence can be brought up either in a bill of exceptions or in a statement upon appeal. The ruling in such a case is made both during the trial and before the rendition of the verdict or decision. By the word "decision," in its connection in section 279, we understand the Legislature to indicate the final decision of the court.

The judgment is affirmed, with costs.

57 And afterwards, to wit, on the — day of ——, A. D. 1881, said plaintiffs filed herein their motion for a rehearing in said cause, which said motion coming on to be heard was by the court overruled, and the court announced its decision and delivered its opinion in writing, of which the following is a copy, to wit:

In the Supreme Court of Montana Territory. August Term, 1882.

ALBERT KLEINSCHMIDT *et al.*, Appellants,

vs.

JAMES S. MCANDREWS and JOHN E. BRISTOL, Respondents.

On motion for rehearing.

Opinion of the court by GALBRAITH, Justice.

This case is presented to us on a motion for a rehearing. It was considered at the January term of this court for 1881, and an opinion then rendered. The action of the court in dismissing the appeal

and affirming the judgment was, as stated in that opinion, for
58 the reason that the proceedings in the court below were not properly brought before this court for review, the method provided by the Code of Civil Procedure for this purpose not having been pursued.

After a careful perusal of the opinion then rendered, and an examination of the arguments of counsel on the rehearing, we see no reason to reconsider our judgment in the premises, but are rather confirmed in our views as to its correctness. In relation only to the question as to whether or not the case is properly before this court for review, we will briefly consider the reasons urged by the appellants on the rehearing. It is claimed that the whole record which contains the pleadings, together with all the proceedings and evidence in the case, is a bill of exceptions. The record does, indeed, at the outset purport to be a bill of exceptions. As such a bill of exceptions however, it is not signed by the judge. Sec. 816, Code of Civil Procedure. The Code of Civil Procedure does not anywhere contemplate such a bill of exceptions. It does not come within the
59 definition, of an exception as provided by law. Sec. 279, Code of Civil Procedure. To hold such a bill of exceptions sufficient would be to establish the precedent that where the entire record purported at its commencement to be a bill of exceptions that this court must then notice every error which the ingenuity of counsel could suggest, without any further specification of the objection in the record whatever. Such a character of practice will not bear consideration for a moment.

Again, it is claimed that the motion for a nonsuit contains evidence of which this court is bound to take notice, because contained in the motion itself; but the motion for a nonsuit is no part of the judgment-roll. Sec. 294, Code of Civil Procedure. Therefore the motion for a nonsuit not being a part of the judgment-roll, this court cannot consider the evidence contained therein, for an appeal from the judgment alone without a statement on appeal, as provided by sec. 419 of the Code of Civil Procedure, brings up nothing but the judgment-roll. We are referred to the case of Cravens *vs.* Dewey, 13 Cal., p. 42, where Baldwin, judge, uses the following lan-
60 guage: "The second error assigned is in granting a nonsuit. A preliminary objection is taken that no motion for a new trial was made, nor is any necessary, the granting of a nonsuit on the facts being a pure question of law, which is properly raised on the record for a review by exception taken."

That a motion for a new trial was not necessary was held in the former opinion rendered in this case. Even if we were inclined to agree with the other position held, viz., that an exception may be taken to the granting of a nonsuit on the facts, nevertheless the exception should comply with the requirements of the law in particularly stating the point of the objection, and also so much of the evidence as is necessary to explain it. The exception in this case is entirely defective in this particular. The motion which is alleged to contain the evidence not being a part of the judgment-roll, and the exception itself not containing such evidence, nor designating

the point of the objection, as required by law, how can this case be held to be properly before us for review? But the plain pro-
61 visions of the Code of Civil Proc., in defining an exception to be "an objection taken at the trial to a decision upon a matter of law, * * * from the calling of the action for trial to the rendering of the verdict or decision," and in designating what are deemed to have been excepted to (secs. 279 & 280, Code of Civil Proc.), as well as the general current of our own and the California decisions on the subject, seem to be as to us conclusive as to the correctness of the position held in our former opinion, that an exception as defined in the above section No. 279 cannot be taken to an order granting a nonsuit on the facts. A strict adherence to the plain and practical requirements of the Code of Civil Proc. in relation to the method of bringing cases here for review will insure uniformity in the practice, and end most useful and advantageous to the profession.

The judgment is affirmed, with costs.

D. S. WADE,
Chief Justice.
WM. J. GALBRAITH,
Asso. Justice.
E. J. CONGER,
Asso. Justice.

62 Thereupon judgment on appeal was entered in the form following, to wit:

In the Supreme Court of Montana Territory. January Term, 1881.

ALBERT KLEINSCHMIDT *et al.*, Appellants,
vs.
JAMES S. McANDREWS & JOHN S. BRISTOL, Respondents.

This cause came regularly on to be heard before the court in the present January term, 1881, on the transcript of the record of the court below therein, which was brought into this supreme court by virtue of an appeal from the judgment of nonsuit of the district court entered in said cause on the 22d day of March, 1880, agreeably to law, and was argued by counsel; whereupon, on consideration, it is now here ordered and adjudged by this court that the said judgment of nonsuit of the court below in this cause be, and the same is hereby, affirmed, with costs. And it is hereby further ordered that said defendants & respondents, James S. McAndrews *et al.*, recover against said plaintiffs & appellants, Albert Kleinschmidt *et al.*, —— dollars for their costs herein expended, and have execution therefor.

11th Feb'y, 1881.

63 And on the 16th day of September, 1882, said plaintiffs & appellants filed herein their writ of error as follows, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said supreme court before you, in a suit between Albert Kleinschmidt, Reinhard Kleinschmidt, Cornelius L. Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, Henry M. Parchen, Harry D'Acheul, John Kinna, William Jack, Moses Morris, David Morris, Noah H. Webster, and Charles Lehman, plaintiffs, and James S. McAndrews and John S. Bristol, defendants, a manifest error has happened, to the great damage of the said Albert Kleinschmidt, Cornelius L. Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, Henry M. Parchen, Harry D'Aucheul, John Kinna, William Jack, Moses Morris, David Morris, Noah H. Webster, and Charles Lehman, as by their complaint appears, we being willing that
64 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court, the 16th day of September, in the year of our Lord one thousand eight hundred and eighty-two (1882).

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
DECIUS S. WADE,
Chief Justice of the Supreme Court of the Territory of Montana.

And on the same day said plaintiffs filed herein their citation as follows, viz:

65 *Citation.*

UNITED STATES OF AMERICA:

In Supreme Court.

ALBERT KLEINSCHMIDT, REINHARD KLEINSCHMIDT, CORNELIUS L. Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, Henry M. Parchen, Harry D'Acheul, John Kinna, William Jack, Moses Morris, David Morris, Noah H. Webster, & Chas. Lehman, Pl'ffs in Error,

vs.

JAMES S. MCANDREWS and JOHN S. BRISTOL, Def'ts in Error.

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Albert Kleinschmidt, Reinhard Kleinschmidt, Cornelius L. Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, Henry M. Parchen, Harry
66 D'Acheul, John Kinna, William Jack, Moses Morris, David Morris, Noah H. Webster, and Charles Lehman are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Decius S. Wade, chief justice of the Territory of Montana, this 16 day of Sept., A. D. 1882.

DECIUS S. WADE,
Chief Justice.

Service of the above citation is hereby admitted and copy waived.

E. W. & J. K. TOOLE,
Att'ys for Defendants.

And on the same day the plaintiffs filed herein their undertaking to accompany said writ of error, of which the following is a copy, viz:

67 Know all men by these presents, that we, James M. Ryan and Carl Kleinschmidt, of the town of Helena, Lewis & Clarke county, Montana Territory, are held and firmly bound unto James S. McAndrews and John S. Bristol in the sum of four thousand dollars, lawful money of the United States of America, to be paid to the said James S. McAndrews & John S. Bristol, their executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 16th day of Sept., one thousand eight hundred and eighty-two (1882).

Whereas lately at a supreme court in and for the Territory of Montana, in a suit depending in said court between Albert Kleinschmidt, Reinhard Kleinschmidt, Cornelius L. Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, Henry Parchen, Harry D'Acheul, John Kinna, William Jack, Moses Morris, David Morris, Noah Webster, Charles Lehman, plaintiffs, and James S. McAndrews and John S. Bristol, defendants, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the
68 clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said McAndrews & Bristol, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs above named shall prosecute said writ of error to effect,

and answer all damages & costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JAMES M. RYAN. [SEAL.]
CARL KLEINSCHMIDT. [SEAL.]

TERRITORY OF MONTANA, *County of Lewis & Clarke:*

Jas. M. Ryan & Carl Kleinschmidt, being duly sworn, each for himself says: That he is a resident of the Territory of Montana, & that he is worth the sum named in the within bond, as a penalty thereof, over & above all his just debts & liabilities, exclusive of property exempt by law from execution.

JAMES M. RYAN.
CARL KLEINSCHMIDT.

Subscribed and sworn to before me, this 16th day of September, A. D. 1882.

CHAS. F. WOODMAN,
Notary Public.

Approved by—
DECIUS S. WADE,
Chief Justice of the Supreme Court, Montana Territory.

69 MONTANA TERRITORY, *ss:*

In Supreme Court.

ALBERT KLEINSCHMIDT *et al. vs.* JAMES S. MCANDREWS *et al.*

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing is a true & correct transcript of certain pleadings, records, and proceedings filed, made, & had in the above-entitled cause as the same appear on file and of record in my office.

Witness my hand & official seal, hereunto affixed, the 30th day of September, A. D. 1882.

[Seal Supreme Court Montana Territory.]

I. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 147. Albert Kleinschmidt, Reinhold Kleinschmidt, Cornelius Vawter, Isaac Greenhood, Ferdinand Bohm, Louis M. Cohn, Richard O. Hickman, *et al.*, pl'ffs in error, *vs.* James S. McAndrews and John S. Bristol. Filed 27th October, 1882.

FILED
JAN 4 1886
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 147.

ALBERT KLEINSCHMIDT AND OTHERS, Plaintiffs in Error,

vs.

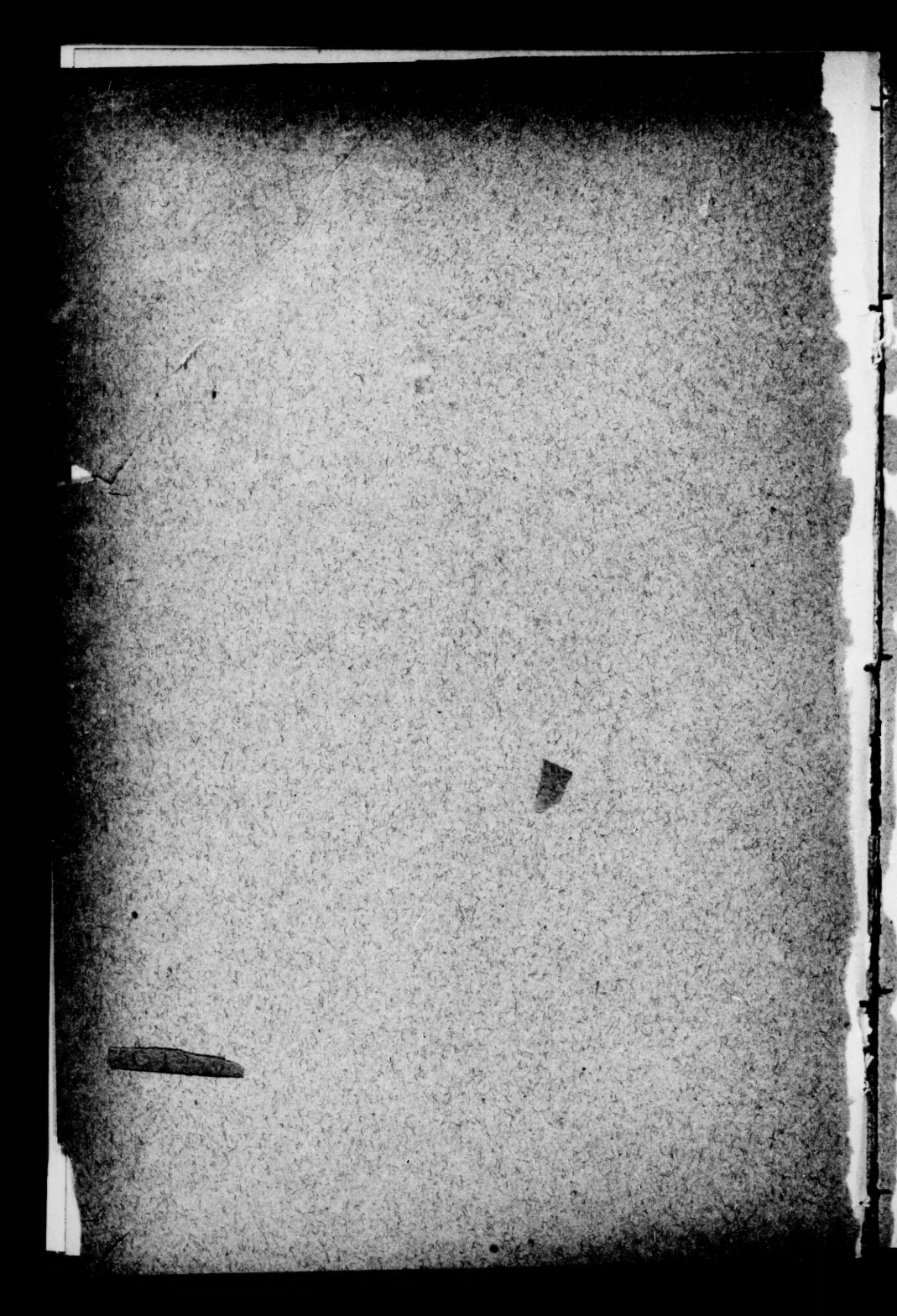
JAMES S. McANDREWS AND JOHN S. BRISTOL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR PLAINTIFFS IN ERROR.

M. F. MORRIS,
For Plaintiffs in Error.

JUDD & DETWEILER, Printers.



Supreme Court of the United States.

OCTOBER TERM, 1885.

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ALBERT KLEINSCHMIDT AND OTHERS, Plaintiffs in Error,

vs.

JAMES S. McANDREWS AND JOHN S. BRISTOL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of Case.

The controversy in this case is as to the validity of a sale of a stock of goods by an insolvent debtor to some of his creditors. The litigation is between the creditors so preferred and an attaching creditor for whom no provision was made.

One A. E. Ingersoll was a merchant, doing business at the town of Vestel, Deer Lodge county, in the Territory of Montana. Having become indebted to the plaintiffs in error, who are all merchants at Helena, in the Territory of Mon-

tana, and being pressed by them for payment, which he was unable to make, he executed and delivered to them, or to the plaintiff Kleinschmidt for them all, on the 29th of March, 1879, a bill of sale of all his stock of goods and of all his credits, to be applied by them ratably to the payment of their claims until they should all be paid. (Record, p. 9.)

This transaction took place at Helena on Saturday night. Thereupon Kleinschmidt immediately delivered the bill of sale to one Wiseman, with instructions to him as agent for the plaintiffs to proceed at once to Vestel, which is about 23 miles distant from Helena, and to take possession of the goods. Wiseman reached Vestel early on Sunday morning and took possession immediately of the goods and of the store in which they were, receiving such possession from one Stephenson, the agent of Ingersoll. Wiseman was in possession on Monday morning, March 31, 1879, when Kleinschmidt himself came and took charge of the business. (Record, pp. 10, 11.)

Later in the day (March 31, 1879), Bristol, one of the defendants and an unsecured creditor of Ingersoll, having caused a writ of attachment to be issued, procured it to be levied by the sheriff (the defendant McAndrews) upon the goods in question as being yet the goods of Ingersoll. (Record, pp. 11, 12.)

Thereupon (April 5, 1879) this suit was instituted by the plaintiffs in error, who were also the plaintiffs below, against the sheriff and the attaching creditor for the unlawful levy.

By a subsequent arrangement, entered into without prejudice to the rights of the parties, the goods were redelivered by the sheriff to the plaintiffs to be sold by them, and the proceeds to be accounted for according to the result of the suit. (Record, pp. 9, 10.)

The amount due to the plaintiffs from Ingersoll was about $3,400, and the goods were sold for about $3,000. (Record,

p. 10.) And it does not appear that there was any unfairness or inadequacy in the amount realized.

Upon the trial of the case in the district court of the Territory the plaintiffs gave testimony tending to prove all these facts as herein stated, and then rested. Thereupon the defendants, without going into any testimony at all on their side, demurred to the plaintiffs' evidence and moved for a nonsuit against them. The court ruled in favor of the motion for a nonsuit. The plaintiffs excepted to the ruling. Judgment was entered for the defendants, and it would appear that the plaintiffs also excepted to the entry of judgment. (Record, pp. 13, 14.)

Upon appeal to the supreme court of the Territory that court held that there was no proper bill of exceptions in the case which it could hear, refused to go into the merits, and affirmed the judgment of the district court. It is to reverse this judgment of affirmance that the present writ of error has been sued out.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that there was no proper bill of exceptions in the case.

2. The court below erred in holding that the plaintiffs had not made out a *prima facie* case upon their testimony.

3. The court below erred in holding that the plaintiffs had not made out a case proper for submission to a jury.

4. The court below erred in holding that the title to the goods in question had not passed to the plaintiffs.

6. The court below erred in directing a judgment of nonsuit to be entered against the plaintiffs.

III.

BRIEF OF ARGUMENT.

1.

Of course, if there is no proper or sufficient bill of exceptions here, the plaintiffs had no standing in the supreme court of the Territory, and they have no standing in this Court.

But we are at a loss to understand the reasoning of the territorial court upon this point, or the narrow and illiberal view which it has taken of the subject. In the opinion of that court (Record, p. 16–23) several provisions are cited from the Civil Code of Procedure of the Territory; but they do not seem to differ substantially, if at all, from the principles of the common law; and this case may therefore be considered upon general principles.

Is there a proper bill of exceptions taken by the plaintiffs, upon which the merits of the case can be reviewed by an appellate tribunal?

Two exceptions appear on the record to have been taken by the plaintiffs—one to the ruling of the court sustaining the motion for a nonsuit (Record, p. 13), and the other to the entry of judgment against the plaintiffs upon this motion for a nonsuit (Record, p. 14).

The supreme court of the Territory seemed to consider that only the latter exception was before it; that none of the testimony could be considered in connection with it; that none of the testimony was included in any bill of exceptions; that there was nothing properly before the court but the mere entry of judgment, and that therefore there was nothing shown to authorize them to disturb that entry.

Now, of course, to the entry of judgment of itself, or to the entry of judgment upon a motion for a new trial being overruled, or to the entry of judgment in pursuance of the decision of the court in any matter within its discretion, no

exception can be sustained; and such was the decision of this Court in the case of Pomeroy *vs.* Bank of Indiana (1 Wallace, 592).

But that is not this case. This is not a judgment after verdict, nor upon a case submitted to the court both upon the law and the facts. It is a judgment peremptorily ordered by the Court in sustaining a motion for a nonsuit. It is not, as it ought to be, an instruction to the jury to render a verdict for the defendants, and thereupon a judgment. If the judgment of the court was simultaneous with the ruling upon the motion, as the territorial court seems to think it was, then the only way to except to the ruling was by excepting to the judgment.

But we are not called upon to follow the somewhat obscure reasoning of the territorial court upon this point. Even if this exception to the entry of the judgment be abandoned, there is a very plain and proper exception taken to the ruling of the court before the entry of judgment (Record, p. 13), which the supreme court of the Territory either overlooked or disregarded; or, if it considered it at all, it would seem to have concluded that there was no record to support it. This position is untenable.

The whole record, from page 1 to page 14, is a bill of exceptions, so stated at the head of it, and showing, in one continuous and consecutive narrative, the pleadings and the testimony upon which the motion for a nonsuit was based and this narrative concluded with the motion, the ruling upon it, the exception to that ruling, the entry of judgment, and the exception to that entry—all certified over the signature and seal of the trial judge to be a correct history of the case; and this is all that a bill of exceptions can be. We are utterly at a loss to understand why the bill of exceptions should be confined to the four lines immediately preceding the signature of the judge on page 14, as the supreme court of the Territory seems to have confined it. That it was intended to begin at page 1 of the record is too plain for argu-

ment; and if it was surplusage to include the pleadings in it, such surplusage certainly cannot vitiate it.

We may justly conclude, therefore, that there is here a proper bill of exceptions; that this bill plainly shows exception to have been taken to the ruling of the trial court which sustained the motion for a nonsuit, and that the bill sets forth all the evidence in the case upon which that motion was based, and by which the propriety or impropriety of the ruling can now be tested.

2.

The next point to be considered is, whether the district territorial court was justified in ordering a nonsuit.

The courts of the United States cannot order a nonsuit This has been decided several times.

Castle *vs.* Bullard, 23 Howard, 172.
Elmore *vs.* Grymes, 1 Peters, 471.
De Wolf *vs.* Raband, 1 Peters, 497.
Crane *vs.* Morris, 6 Peters, 609.
Silsby *vs.* Foote, 14 Howard, 222.

3.

But if more latitude is to be allowed to these territorial courts in this respect than to the other courts of our Federal Union, and the nonsuit is to be taken as equivalent to an instruction to the jury to find a verdict for the defendant, the ruling was wrong upon its merits.

We may presume that the ruling was based upon some or all of the reasons assigned in support of the motion for nonsuit by the counsel for the defendants in the district court; and it is therefore proper to examine these reasons, especially as they seem to comprise all that can be assigned in favor of the motion and against the validity of the sale to the plaintiffs.

There are six of these reasons assigned.

The first is a general one, that no case had been made for a jury. The second is, that the plaintiffs were special, not general, owners. The third, fourth, and sixth are to the effect that there was no sufficient or proper change of possession of the property. And the fifth is that Ingersoll had made the transfer to defraud and delay the defendant Bristol, and that the plaintiffs had notice of such purpose.

These reasons will be considered in their inverse order.

4.

As to the alleged fraudulent purpose of Ingersoll, there is not one scintilla of evidence from the beginning to the end of the record tending in the remotest degree to show it. Nor, if there was such a purpose, is there one iota of evidence tending to show that the plaintiffs had any knowledge of it.

This ground, therefore, may be summarily dismissed from consideration.

But in this connection it may be recalled that the goods assigned by Ingersoll to the plaintiffs had been actually purchased by him from the plaintiffs, and his indebtedness to the plaintiffs was for the purchase-money. (Record, p. 12.) It does not appear what the consideration was for the indebtedness to Bristol.

5.

The burden of the third, fourth, and sixth reasons assigned by the defendants in support of their motion is that there was no immediate transfer or delivery of possession to accompany the bill of sale.

The bill of sale was executed on Saturday night. The goods were twenty-three miles away. Possession was taken on Sunday morning. Could there have been more speedy delivery of possession? Is there any rule of law that requires instantaneous delivery of possession to accompany the execution and delivery of a bill of sale? We are not aware of any such rule.

It is true there is a statute of the Territory of Montana which invalidates all bills of sale not accompanied by an immediate transfer of the property. The statute is as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignment or subsequent purchasers in good faith." (Codified Statutes of Montana of 1871–2, chap. 16, section 15.)

This is a very peculiar statute; but assuredly "immediate delivery" does not mean "instantaneous delivery;" otherwise no valid sale would be possible except in the actual presence of the goods to be sold. No such absurdity as this is contemplated by the statute. The statute should receive a reasonable construction; and no such construction is either necessary or proper as would paralyze all the ordinary transactions of mercantile business. The delivery here was "*immediate*" in every just and proper sense of the word.

6.

It is objected, in the next place, that the plaintiffs, under the bill of sale, were special, not general, owners.

If it be meant by this, that the plaintiffs were merely trustees of the property for themselves and the vendor until their claims were paid and satisfied, it is not apparent how this differs from any other assignment, nor is it apparent why a trustee or assignee, or any other special owner, may not defend his title against general creditors of his grantor.

If it be argued that the assignment by Ingersoll to the plaintiffs was only a conditional assignment "until the amounts due to them shall be paid," and that therefore there was an interest in the property reserved to himself, the answer is that this is only such an interest as the law would

reserve in any event, and that the reservation is not one to the detriment of creditors. It leaves the residuum, if there is any residuum, still subject to the lawful claims of creditors.

But the assignment here was in plain terms an assignment for the benefit of all the creditors mentioned in it, and no question of special ownership can arise in regard to it.

7.

There remains for consideration the general objection that the plaintiffs had not made out a case sufficient for submission to the jury.

We have seen that the several specifications under this general head are untenable, and the general objection might therefore be dismissed without further consideration; but if we look at the matter generally, was there not a proper case made out for the jury? Was there not in fact a complete case?

A bill of sale regular in form, on adequate consideration, a *bona fide* indebtedness, an immediate transfer of possession, no evidence of fraudulent purpose, a transaction evidenced throughout by good faith, it is difficult to conceive what further there could be to make a valid and effective sale. That there was some race of diligence may be inferred from the haste with which it was sought to take possession of the goods, but assuredly this is not an element to vitiate the transaction.

8.

Evidently the supreme court of the Territory was wrong in its conclusion upon the technical question raised before it, and the district court was equally wrong in its decision upon the motion for a nonsuit. It is respectfully submitted that the judgment should be reversed, and that the cause should be remanded for a new trial.

M. F. Morris,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
NOV 20 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 147.

ALBERT KLEINSCHMIDT ET AL., PLAINTIFFS IN ERROR,

vs.

JAMES McANDREWS AND JOHN BRISTOL, DEFENDANTS IN ERROR.

In Error to the Supreme Court of Montana Territory.

Edmund W Toole and

BRIEF OF JOSEPH K. TOOLE, OF COUNSEL FOR DEFENDANTS IN ERROR.

JUDD & DETWEILER PRINTERS

Supreme Court of the United States.

No. 147.

ALBERT KLEINSCHMIDT ET AL., PLAINTIFFS IN ERROR,

vs.

JAMES McANDREWS AND JOHN BRISTOL.

Error to the Supreme Court of Montana Territory.

BRIEF OF DEFENDANTS IN ERROR.

1st. The bill of exceptions contained in the transcript in this cause cannot be considered by the court on this appeal.

It could not, in the very nature of things, have been taken and filed until after the rendition of the judgment of non-suit. It is, therefore, no part of the judgment roll, and *cannot* be examined on an appeal from the judgment.

Sections 279 and 294, Laws 1877, are as follows:

"An exception is an objection taken at the trial to a decision upon a question of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge of a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision; but no exceptions shall be regarded on a motion for a new trial or on an appeal, unless the exception be material and affect the substantial rights of the parties."

Immediately after entering the judgment the clerk shall put together and file the following papers, which shall constitute the judgment roll:

"First. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed upon the complaint that the default of the defendant in not answering was entered and a copy of the judgment——"

Second:

"In all other cases the summons, pleadings, verdict of the jury, or finding of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties."

This is the only bill of exceptions provided for by the statutes which becomes a part of the judgment roll. It is confined exclusively to the decision of the court upon a matter of law, must be before the final determination of the case, taken during the trial, and the point of the exception particularly stated. Section 281 is as follows:

"The point of the exception shall be particularly stated, except as provided in relation to instructions, and may be delivered in writing to the judge, or, if the party requires it, it shall be written down by the clerk. When delivered or written down by the clerk it shall be made conformable to the truth or be at the time corrected until it is made so conformable. When not delivered in writing or written down as above it may be entered in the judge's minutes, and afterwards settled in a statement of the case, as provided in this act: Provided, That if the judge shall in any case refuse to allow an exception in accordance with the facts any party aggrieved thereby may petition the Supreme Court for leave to prove the same, and shall have the right to do so in such mode and manner and according to such regulations as the Supreme Court may by rules prescribe."

The authorities all concur upon the proposition that on an

appeal from a judgment the judgment roll alone can be considered.

2d. Nor will the court consider what purports to be a bill of exceptions as a statement upon appeal, 1st, because it is not made in the manner provided by the statute; 2d, it does not point out particularly the errors, nor contain any assignment of errors, as required by section 419. See Wetherbee *vs.* Carroll *et al.;* 33 Cal., 549; Russell *vs.* Sharkey, 46 Cal., 3, *et seq;* 10 *Id.*, 194; 11 *Id.*, 339, 391; 12 *Id.*, 280.

3d. Because the question as to whether or not the judgment of nonsuit *was* or *was not* supported by the evidence could only be heard upon an appeal taken within *sixty days* after its rendition. This is the real question in this case, and if it was *not actually necessary* to have moved for a *new trial* in *the court below*, in order to review the case upon its merits as to the sufficiency or insufficiency of the evidence to support the decision or judgment of the court, it was necessary that the appeal should have been taken within sixty days, in order to give the court jurisdiction to determine this question. Section 408, stat. of 1877, is as follows:

"An appeal may be taken: 1st. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment; but an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment unless the appeal is taken within 60 days after the rendition of the judgment. 2nd. From a judgment rendered on an appeal from an inferior court within ninety days after the entry of such judgment. 3rd. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment and from an interlocutory judgment in

actions for partition of real property within sixty days after the order of interlocutory judgment is made and entered in the minutes of the court or filed with the clerk."

This seems to us conclusive of this case, unless, from an inspection of the judgment *roll alone*, error can be found upon which the case should be reversed. There is no pretext even for this, and it is not claimed or urged by appellants that there is. A motion for a new trial should have been made. It is the only mode provided by the statute for reviewing a question of fact. The judgment of the court upon the sufficiency or insufficiency of the evidence may in every case be said, in some sense, to be a decision of a matter of law. When the facts are ascertained the deductions therefrom may be denominated conclusions of law. Yet, under our system of practice, when the functions of the court are invoked to pass upon the question of the sufficiency or insufficiency of the evidence upon which a verdict or the decision of a court or referee is based, the statute has pointed out but one way in which it can be done, and it is exclusive of all others. The statute that provided for the presentation of these questions by the mode pursued in this case, *i. e.*, by bill of exceptions, was repealed by the practice act of 1877. Section 408, *supra*, provides the time within which the appeal shall be taken, and sections 284 and 285 the mode of presenting the question. (See Levy *vs.* Getterson, 27 Cal., 685, *et seq.*; Harris *vs.* S. F. R. Co., 41 *id.*, 404; 27 *id.*, 107, approved in 2 Montana, 555; Allport *vs.* Kelly, 2 Mont., 343.)

The Court here will infer that all the evidence necessary to support the findings or decision of the court was introduced by the plaintiffs on the trial of the case below. This has been too often settled here and elsewhere under statutes like ours to require the citation of authorities to support it. The only mode of entertaining a bill of exceptions which was not taken at the trial and before its conclusion, so as to

become a part of the judgment roll, is under the second subdivision of section 287 of the practice act:

"If the motion is to be made upon a bill of exceptions and no bill has already been settled, as hereinbefore provided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment or after receiving notice of such entry provided by section 281 (*supra*), and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed when the notice of motion is given such bill shall be used on the motion."

But even if taken and presented under this section of the practice act—that is, on a motion for a new trial—it does not show that it was all the evidence introduced on the trial. The decision of the court as matter of law upon the facts should be specified on motion of a new trial. See Donahue *vs.* Gallavan, 43 Cal., 573, *et seq.*; City of Stockton *vs.* Cram, 45 Cal., 247, *et seq.*; 1 Montana, 263, *et seq.* 42 Cal., 444. If appellants had offered certain evidence during the trial to support the issues on their part and the court had excluded it, and thereupon a bill of exceptions had been signed and filed, then the bill would become a part of the judgment roll, and the Court here would examine into it for error on an appeal from the judgment alone without any statement on appeal or motion for a new trial. We earnestly protest against such an innovation of the practice act, and the settled construction it had received prior to its adoption here, as is sought to be accomplished by the appellants, and submit with confidence the position we have taken under the authorities cited:

1st. The court has no jurisdiction to look behind the judgment roll and examine into the merits of a bill of exceptions taken after the trial has terminated by the judgment of the court below.

2d. That there is no statement on appeal, and the sufficiency or insufficiency of the evidence could not be considered if there was, nor could they entertain it under section 408 civil practice act, which has just been quoted above.

3d. No motion for a new trial was made so as to bring it within the provisions of the second subdivision of section 287 of the practice act, as above quoted.

4th. Should the court, however, be of opinion that it has jurisdiction upon an *appeal* from the *judgment*, without any bill of exceptions forming a part of the judgment roll, any statement on appeal, or motion for a new trial, so as to present properly the questions of law, or sufficiency of the evidence to justify the decision, and should feel disposed to determine the questions presented by the record for the purpose of settling an important proposition in this Territory, then we say that section 15, in connection with section 16, page 394, Codified Statutes, 1872, is conclusive against the position of appellants. Section 15 provides that "every sale, etc., unless *the same be accompanied* by the *immediate* delivery of the *thing sold*, etc., *shall be conclusive* evidence of fraud as against *creditors* of the *vendor*," etc.

Section 16, in defining the class of persons against whom a sale, *unaccompanied* by *immediate delivery*, shall be *void*, says: "It shall include any creditor of the vendor or assignor at *any* time while such goods and chattels shall remain in his possession or under his control." The bill of exceptions and record show that Bristoe was a creditor intermediate the sale, before the delivery, and while the goods were in possession and under the control of Ingersoll. These provisions are emphatic and unequivocal. They should not be frittered away by loose construction, or made to bend to any imaginary idea of expediency. Counsel for appellant seem to rely much upon an interpretation put upon the statute of California at an early date by Mr. Chief Justice

Murray in a *very* brief opinion contained in 5 Cal., 227. Taking it that he was the great jurist he is claimed to be by appellants, and that he is *accurate* in his quotation of the statute then in force in that State, and you will find a vast difference in its phraseology from the one under consideration.

He says: "To constitute a valid sale of personal property against creditors, there must, according to the provisions of the statutes of this State, be 'an immediate delivery thereof, *accompanied* with an actual and continuous change of possession.'" It will be seen also, by reference to Wood's digest of California statutes, p. 107, secs. 403, 404, that its language has been changed so as that it is identical with sections 15 and 16 of our statutes. This may in a measure account for the different construction given it by the recent California decisions. The word "accompanied" is taken from that portion of the section referring to the change of possession, and placed in such connection that it qualifies the phrase "immediate delivery," which in turn refers to and qualifies sale. Under the statute thus transposed, the delivery must not only be immediate, but it must *accompany* the sale. All the argument of counsel that the articles to be delivered are bulky, or may be at a great distance from the place of sale, is solved by the single suggestion that a delivery and acceptance is necessary, and that a bill of sale is not usually so bulky or unwieldy as that it would be cumbersome to *accompany* the sale and delivery." Some States have seen proper to make provisions for the exigencies suggested by counsel for appellants. Others have doubted its propriety, and consider that it subverts the very objects of the statute of frauds, and opens wide the gate for the consummation of that which it was obviously intended to prevent. Such has been the judgment of our legislative assembly, and the court below has but followed the law:

"There are some questions the answers to which are so palpable and plain that a lawyer often finds himself at an

utter loss to find argument to maintain. Of such character is the one presented to the court."

They are generally found where the plain, palpable, and unmistakable language of a statute and unequivocal decisions of the courts under it are sought to be invaded by the mere *ipse dixit* of counsel. "Of such character is the one presented to the court" by the counsel of appellants in the court below, and their apology therefor is gratefully accepted. The questions submitted involve a construction of sec. 15, p. 394, laws of 1872, as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignments or subsequent purchasers in good faith."

We quite agree with counsel for appellants that we are not entirely without authority or precedent to guide us.

Indeed, we have the concurrence of (Judge) Chief Justice Murray, "one of the ablest judges who ever occupied a seat on the bench of the supreme court of California," in an opinion opposed to the learned gentleman who prepared the brief of appellants in this case.

Chenery *v.* Palmer, 6 Cal., 119.

This case goes further, and holds that such a transfer as this is void as to creditors, and though delivery be made before levy is made by the creditor. To the same effect is the last adjudication by the same court on this question.

John A. Watson *v.* John Rogers, 53 Cal., 401.

In this last case, Judge Rhodes, speaking for the entire court, says:

"It (the Code) denounces the transfer as fraudulent and

void as against the claims of a creditor, who is such creditor during any of the time that the *person* who *makes the transfer, remains in possession after a transfer* which is not accompanied by an immediate delivery and followed by an actual and continued change of possession. Such a transfer being void as to the creditor, he may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor."

The argument of appellants is ingenious, and might with more propriety be addressed to the Legislature than the courts. However honest the transaction or intentions of the parties, the law, as it now exists, from motives of public policy, declares the contract void.

To remedy evil results which sometimes follow the enforcements of such a statute, and to meet such arguments and exigencies as are presented by appellants, it does not seem to us to depend so much "upon the length of the arm" to acquire possession, but rather whose arm it is.

"The strong arm of the law" appears to be more effective, however odious may be the comparison with the *length* of appellants. See Statutes of Missouri, sec. 10, ch. 67; R. C., 1845. It provides: Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by *delivery in a reasonable time, regard being had to the situation of the property*, and be followed by an actual and continued change of possession of the thing sold, shall be presumed to be fraudulent and void as against creditors of the vendor or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear to the jury, on the part of the person claiming under such sale, that the same was made in good faith and without any intent to defraud such creditor or purchaser.

Mark the distinction: Here provision is made for a delivery in a "reasonable time," and the presumption of fraud may be rebutted by proof of the *bona fides* of the transaction.

Neither is permissible under the fifteenth section of our statutes of frauds.

See Lesem *vs.* Harniford, 49 Mo., 323.
Woods *vs.* Bugbey, 29 Cal., 479.

In this latter case the court says:

"If, in fact, there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and the courts have no right to seek to evade its force and effect. No excuse or explanation can be entertained," etc.

Such a rule is the only one consistent with the object and purpose of the statute of frauds. It may be hard in a particular case, but it is founded in public policy, and cannot be made to yield to expediency or the circumstances of a given case. A principle once surrendered in a particular case is no longer firm, but trembles at every new attack.

If a person in the town of Helena who buys a stock of goods in Vestal in another country is allowed a reasonable time in which to take possession in the absence of a statute *expressly* authorizing it, why would not a person who buys a stock of merchandise in Madison, Custer, or Missoula counties be permitted a reasonable time in which to take possession from the remotest portion of the territory, if he happened to be there at the time of the purchase, and we do not believe that this would be contended?

If an individual should purchase at Helena from a firm at Miles city, six hundred miles away, their stock of goods, and start without delay to take possession, and in the meantime a creditor of the vendor should levy on the property, would it be contended that the purchaser would have a "reasonable time" in which to take possession? We think not. Nor would it make any difference whether the creditor's levy was before or after such possession was taken by the vendee.

Chenery *vs.* Palmer, *supra.*
Watson *vs.* Rogers, *supra.*

If the time can be extended one hour to meet the exigencies of a particular case, it may be extended from that period indefinitely to meet the exigencies of another case, and thereby foster and encourage the very mischiefs the statute was designed to condemn. In resisting the first encroachment the rule should be "*obsta principiis.*"

There is no dispute that a bill of sale was *intended* as an absolute sale, and to pass the title, but to have this effect under our statute the vendee ought to be where the property is when purchased. This position, we think, is strengthened by the statutory provision concerning chattel mortgages, which protects the mortgagee's rights while the property remains in possession of the mortgagor for a sufficient length of time in which to take *possession* or to record his mortgage, if the mortgage provide for retention of possession by the mortgagor.

The statute is in these words:

"The mortgagee, in all mortgages made under this chapter, shall be allowed one day for every twenty-five miles of the distance between his residence and the county recorder's office, where such mortgage ought, by law, to be recorded, to conform with the provisions of this chapter, before any attachment or execution shall be valid made by the creditor of the mortgagor."

Comley's Codified Statutes, sec. 906, p. 808.

In other words this section *expressly* gives to the mortgagee a reasonable time in which to take possession or comply with the other requirements, and defines, in effect, what a reasonable time is. Appellants ask the Court to interpolate a similar provision into the section under consideration, when the Legislature manifestly intended what it says, that sush a sale shall be "*accompanied*" by an immediate delivery, and *followed* by a continued change of possession.

We do not quite agree with the learned counsel for appellants that the construction given to this statute by the court

below "will tend to the destruction of business." If so, as before suggested, the innovation upon the statute ought not to be made by the court, but the argument should be addressed to the legislative assembly.

It was insisted upon by appellants, on a rehearing of this case in the Supreme Court of the Territory, that it was not proper for the court to grant a nonsuit under the provisions of the statutes of this Territory. There was no statement on appeal and no motion made for a new trial. All that can be considered here is the judgment roll. This court and other courts, under a similar statute, have so often decided this question that it can certainly be no longer an open one.

The bill of exceptions was not signed until after the judgment of nonsuit. It could not have been, in the very nature of things. Consequently, under the statute, it forms no part of the judgment roll, and cannot be considered on this appeal, whether in criminal or civil cases.

This court has uniformly held that the appellant, in order to have alleged errors reversed, must preserve and present them in the mode prescribed by the statute, or they cannot be entertained.

The evidence, or its sufficiency or insufficiency to support the judgment of nonsuit, we take it, is not a proposition to be considered, nor is it comprised in the question upon which the rehearing is to be had. The complaint, answer, replication, and judgment, being all that is before the court, show that a nonsuit was had. It will be presumed, therefore, to have been properly granted, if the court had the power under the statute to grant it. We have referred to this for the reason that counsel for appellant have cited us to a case which bears alone upon the question of the sufficiency of the evidence to support the judgment of the court. First, sec. 184, Statutes of 1882, is as follows:

"An action may be dismissed or a judgment of nonsuit entered in the following cases: First. By the plaintiff him-

self, at any time before trial, upon the payment of costs if a counter-claim has not been made. * * * Second. By either party upon the written consent of the other. Third. By the court, when the plaintiff fails to appear on the trial and the defendant appears and asks for the dismissal. Fourth. By the court, when upon trial and before the final submission of the case the plaintiff abandons it. Fifth. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register."

Under this section, then in force, did the court have power to grant a nonsuit upon a total failure of proof of an immediate delivery accompanying the sale, as provided by sections 15 and 16, Codified Statute, 1872, above quoted?

(A.) Section 241, Revised Statutes of Montana, is as follows:

"In actions for the recovery of specific real property, with or without damages, and for an injunction to stay waste, or for money claimed as due upon a contract, or as damages for a breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered by consent of the parties. In all cases where there are issues of both fact and law the issues of law must be first disposed of, and in all cases issues of fact must be tried by a jury (except in actions which involve the settlement of accounts between the parties), unless a jury shall be waived by the parties."

The above-quoted statute provides for the submission of all questions of facts to a jury, unless a jury is waived; and section 234 (preceding the submission of the case to the jury), subdivision 5, which is as follows: "An action may be dismissed or a judgment of a nonsuit entered (5) by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury," confers upon the court power to grant a nonsuit, upon motion of defendant, when plaintiff fails to prove a sufficient

case for the jury. The mode of reviewing the question of the sufficiency of the proof is familiar to court and counsel.

Under these sections of the statutes it never has been doubted but that the court has power to, and that it was its duty, if it would set aside a verdict upon the insufficiency of the evidence, when such a motion was properly presented, to grant a nonsuit when requested by defendant.

The constitutional right of trial by jury at common law has never been construed to abridge the right of the court, upon a failure of proof, or upon uncontradicted testimony, to grant a nonsuit.

Certainly section 174, supra, is not stronger in its terms, nor does it comprise more, than sections 237 to 241, inclusive; both in like terms define *what is a question of fact and to whom it shall be admitted*, and are as follows:

"An issue arises when a fact or conclusion of law is maintained by the one party and is controverted by the other. Issues are of two kinds—first, of law; and, second, of fact."

"An issue of law arises upon a demurrer to the complaint or answer or replication or to some part thereof."

"An issue of fact arises, first, upon a material allegation in the complaint controverted by the answer; and, second, upon new matter in the answer controverted by the replication, or upon new matter in the replication, except an issue of law is joined thereon.

"An issue of law must be tried by the court unless it is referred upon consent."

See 24 Comstock, 468.

Territory *vs.* McAndrews, 3 Mon., *et seq.*

(*b.*) There is no trouble in the case when the proper distinction is made between *actual* or *positive* fraud and *constructive* or legal fraud. In the former class of cases intent alone constitutes the fraud. They are cases *quasi* criminal in their character, and are especially referred to a jury to pass upon that question. In the latter class of cases a transaction under a given state of facts is declared *per se* to be a fraud as to creditors, regardless of what the intent of the parties may

have been. See sects. 169 and 170, as quoted *supra*. Now, by sec. 174, last cited, it will be seen that it is only in cases where *fraudulent intent* is involved that it is deemed a question of fact and not of law. Under the maxim "*expressio unius, exclusio alterius*," it is tantamount to saying that in other cases, the facts being undisputed, it is a question of law, and under subd. 5, section 234, a nonsuit is proper; and this is just what all the authorities upon the subject say so far as we have been able to discover.

Ringold *vs.* Haven, 1 Cal., 108, 121, 125.
Fitzgerald *vs.* Brown, 4 Cal., 289.
Cheeney *vs.* Palmer, 6 Cal., 119 (5th ed.), 503.
Ensminger *vs.* McEntire, 23 Cal., 593.
Davis *vs.* Woods, 29 Cal., 466.
Levy *vs.* Getleson, 27 Cal., 685.
Claflin *vs.* Rosenbury, 42 Mo., 439, 44 *Id.*, 323.
Bishop *vs.* O'Connell, 55 Mo., 158.
Donohue *vs.* Gallavan, 43 Cal., 576.
Miller, Brown & Co. *vs.* Henry, 40 Pa., 352.
Luck *vs.* Skants, 2 Phill. (Pa.), 310.
Charge to Jury, Thompson, sec. 21, p. 24.
13 U. S. Digest, N. S., p. 343, sec. 3157
And authorities there cited.

Watson *vs.* Rogers, 53 Cal., 401.

For authorities at common law referred to in 27 and 29 Cal. and 42, 44, and 56 Mo. *supra*, see Edwards *v.* Harlem, 2 T. & R. Rep., 587; Hamilton *vs.* Russell, 1 Curtis, 415; S. C., 1 Cranch (U. S.), 310; Griswold *vs.* Sheldon, 4 Comstock, N. Y., 581 *et seq.*, and authorities there cited.

In conclusion, defendants in error respectfully call the attention of the Court to the opinion of the supreme court of Montana Territory upon the motion for rehearing, upon this matter of practice under the statutes, quoted herein as found on page 223 *et seq.*, vol. 4, Montana Report—

"This case is presented to us upon a motion for rehearing. It was considered at the January term of this court for 1881, and an opinion then rendered. The action of the court in dismissing the appeal and affirming the judgment was, as stated in that opinion, for the reason that the proceedings in the court below were not properly brought before this court for review —; the method provided by the code of civil procedure for this purpose not having been pursued. After a careful perusal of the opinion then rendered, and an examination of the arguments of counsel on the hearing, we see no reason to reconsider our judgment in the premises, but are rather confirmed in our views of its correctness.

"In relation only to the question as to whether or not the case is properly before this court for review, we will briefly consider the reasons urged by appellants in the rehearing.

"It is claimed that the whole record which contains the pleadings, together with all the proceedings and evidence in the case, is a bill of exceptions. The record does, indeed, at the outset, purport to be a bill of exceptions. As such a bill of exceptions it is not, however, signed by the judge. See code of Civil Procedure, sect. 816, which is as follows: 'All bills of exceptions shall be reduced to form unless noted by the clerk and signed during the term in which the same is tried, except in cases where the counsel consent, or the judge, by an entry on the record, direct that it may be prepared in vacation and signed *nunc pro tunc*. The bill of exceptions must be signed by the judge who tried the cause, and if he has inadveretntly omitted to sign the bill of exceptions, he may, on motion, be permitted to do so, although his term of office has expired or said office has otherwise become vacant.'

"The Code of Civil Procedure does not anywhere contemplate such a bill of exceptions. It does not come within the definition of an exception as provided by law. (See Code of Civil Procedure, sec. 279, *supra*.) To hold such a bill of exceptions sufficient would be to establish the precedent that where the entire record purported at its commencement to be a bill of exceptions this Court must then notice every error which the ingenuity of counsel could suggest, without any further specification of the objection in

the record whatever. Such a character of practice will not bear consideration for a moment.

"Again, it is claimed that the motion for a nonsuit contains evidence of which this Court is bound to take notice, because contained in the motion itself. But the motion for a nonsuit is no part of the judgment roll. (See Code of Civil Procedure, 234, *supra*.) Therefore, the motion for a nonsuit not being a part of the judgment roll, this Court cannot consider the evidence contained therein, for an appeal brings up nothing but the judgment roll. We are referred to the case of Cravens *vs.* Dewey, 13 Cal., 42, where Baldwin, J., uses the following language:

"'The second error assigned is in granting a nonsuit. A preliminary objection is taken that no motion for a new trial was made; nor was any necessary—the granting of a nonsuit on the facts being a pure question of law, which is properly raised on the record for a review by exception taken.'

"That a motion for a new trial was not necessary was held in the former opinion rendered in this case. Even if we were inclined to agree with the other position held, viz, that an exception may be taken to the granting of a nonsuit on the facts, nevertheless the exceptions should comply with the requirements of the law in particularly stating the point of the objections, and also so much of the evidence as is necessary to explain it. The exception in this case is entirely defective in this particular. The motion which is alleged to contain the evidence not being a part of the judgment roll, and the exception itself not containing such evidence, nor designating the point of the objection, as required by law, how can this case be held to be properly before us for review?

"But the plain provision of the Code of Civil Procedure, in defining an exception to be 'an objection taken at the trial to a decision upon a matter of law * * * from the calling of an action for trial to the rendering of the verdict or decision,' and in designating what are deemed to have been excepted to (secs. 279, 280, *supra*, of Code of Civil Procedure), as well as the general current of our own and the California decisions on this subject, seems to us to be conclusive as to the correctness of the position held in our former opinion,

than an exception as defined in the above-quoted section 279 cannot be taken to an order granting a nonsuit on the facts.

"A strict adherence to the plain and practical requirements of the Code of Civil Procedure, in relation to the method of bringing cases here for review, will insure improvement in the practice, an end most useful and advantageous to the profession."

Edwin W. Toole By JOSEPH K. TOOLE,
Of Counsel for Respondent in Error.

MAR 8 1886

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 147.

ALBERT KLEINSCHMIDT ET AL., PLAINTIFFS IN ERROR,

vs.

JAMES S. McANDREWS ET AL., DEFENDANTS IN ERROR.

POINTS AND AUTHORITIES OF DEFENDANTS IN ERROR IN REPLY.

EDWIN W. & JOSEPH K. TOOLE,
For Defendants in Error.

JUDD & DETWEILER, PRINTERS.

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1st. Counsel for plaintiffs starts out with an erroneous assumption. It is claimed that the civil practice acts of the Territory of Montana, with respect to the question of practice involved in this case, do not substantially differ from the principles of the common law, and that, therefore, the question may be considered upon general principles.

This question in no way involves the exercise of equitable or common-law jurisdiction of the court as conferred by the organic act. It comprises purely a question of practice as to the mode of procedure by which appeals are taken and errors reviewed by the supreme court of the Territory.

See Toombs *vs.* Hornbuckle. 18. Wal. 648

Being, therefore, a rightful subject of legislation by the

Legislative Assembly of the Territory, it has seen proper to make the following provisions with reference to this question of practice (Revised Statutes of Montana, "Code of Civil Procedure," page 95):

SEC. 294. Immediately after entering the judgment the clerk shall attach together and file the following papers, which shall constitute the judgment roll:

First. In case the complaint be not answered by any defendant the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed upon the complaint that the default of the defendant in not answering was entered, and a copy of the judgment.

Second. In all other cases the summons, pleadings, verdict of the jury, or finding of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties.

CHAPTER IX.

EXCEPTIONS.

Sec. 279. *What are exceptions and how regarded.*
Sec. 280. *What deemed to have been excepted to.*
Sec. 281. *Points of exception to be stated, and must be conformable to truth or be corrected.*
Sec. 282. *Form of exception to be brief.*
Sec. 283. *When, on motion for new trial, exceptions deemed taken.*

SEC. 279. An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge of a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision; but no exceptions shall be regarded on a motion for a new trial or an appeal unless the exception be material and affect the substantial rights of the parties.

SEC. 280. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order, or decision finally determining the rights of the parties, or some of

them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance; an order made upon *ex parte* application, and an order or decision made in absence of a party are deemed to have been excepted to.

SEC. 281. The point of the exception shall be particularly stated, except as provided in relation to instructions, and may be delivered in writing to the judge, or, if the party require it, it shall be written down by the clerk. When delivered in writing or written down by the clerk it shall be made conformable to the truth or be at the time corrected until it is made so conformable. When not delivered in writing, or written down as above, it may be entered in the judge's minutes, *and afterwards settled in a statement of the case, as provided in this act: Provided*, That if the judge shall in any case refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the supreme court for leave to prove the same, and shall have the right to do so in such mode and manner, and according to such regulations, as the supreme court may by rule prescribe.

SEC. 282. No particular form of exception shall be required. The objection shall be stated with so *much of the evidence or other matter* as is necessary to explain it, but no more, and the whole as briefly as possible.

SEC. 283. When a cause has been tried by the court or by the referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to on motion for a new trial, or on appeal, without any special notice that an exception is taken thereto.

It is clear that the ruling of the court, in granting a nonsuit under these sections of the statute is deemed excepted to, and if a bill of exceptions were afterwards signed it would not become a part of the judgment roll, but should be included in a statement of the case, as provided by the code of civil procedure. It is also clear that a statement of the evidence is necessary to review this order finally deter-

mining the rights of the parties in this action. It involves the question of sufficiency of the case made to go to the jury, as we will hereafter see.

This statement of evidence on appeal is controlled by the following provisions of the code of civil procedure, of which the foregoing are also a part.

Revised Statutes of Montana, p. 122.

SEC. 419. When the party who has a right to appeal wishes a *statement* of the *case* to be annexed to the record of the judgment or order he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and file the same with the clerk of the court, and *give notice* to the *opposite party*, or his attorney, of such filing. The respondent may, within *five days* thereafter, prepare amendments to such statement, and file the same, and serve notice thereof on the opposite party. The statement and amendments which may be filed shall be *presented* to the *judge* or court upon notice of two days to the opposite party, and a true statement shall thereupon be *settled* by the judge or court. If no amendments are filed the statement may be presented to the judge or court without any notice to the respondent.

The Legislative Assembly have declared the manner in which this statement shall be prepared, amendments filed, and settlement thereof had. Instead of allowing an attorney to prepare an *ex parte* statement, have it signed as a bill of exceptions, and serve a copy upon the opposite party, it has adopted a more salutary and safer mode, by requiring the statement to be filed first, then a copy to be served on the adverse party, who shall have five days in which to file his amendments, and after all this is done a settlement of the statement is made. If this course had been pursued counsel for plaintiffs in error would probably have had less cause

of complaint on account of the rulings of the trial judge on the *merits* of the motion for a nonsuit.

This *question* of *practice* under the California code and the code of Montana, which was taken from it, has been settled too long and firmly in accordance with the rulings of the supreme court of Montana Territory to be now overturned.

The order granting a nonsuit and judgment entered thereon are deemed excepted to. It is only exceptions taken before these entries, and reduced to writing and signed by the judge during the trial, that form a part of the judgment roll. To determine the correctness of this judgment of nonsuit it is necessary that a statement of the evidence be prepared, filed copies served, and amendments prepared and filed, and then a settlement had, in order to carry it up as a part of the record on appeal from this order and judgment.

See this case, 4th Montana R., 8, *et seq.*, and rehearing, *id.*, p. 223, *et seq.*

Witherbee *vs.* Carroll, 33 California, 549.

This same code of civil procedure, page 82, subdivision *five* of section 234, provides as follows:

An action may be dismissed or a *judgment* of a nonsuit entered in the following cases: * * * Fifth, by the court, upon motion of defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

It is claimed by plaintiffs in error that the court had no power to grant a nonsuit, and decisions of this court in cases on appeal from the United States courts are cited in support of that position. The cases cited are not authority upon the questions here involved. The territorial courts derive their powers and existence from that provision of the Federal Constitution which confers upon Congress the right to make all needful rules and regulations for the government of the